No. 16226

United States
Court of Appeals
for the Ninth Circuit

TRI-STATE MUTUAL GRAIN DEALERS FIRE INSURANCE COMPANY,

Appellant,

vs.

C. R. MORRIS, CONSTANCE B. HONAKER, THE HOME INSURANCE COMPANY and THE CANADIAN FIRE INSURANCE COMPANY,

Appellees.

C. R. MORRIS and CONSTANCE B. HONAKER,

Appellants,

vs.

THE HOME INSURANCE COMPANY and THE CANADIAN FIRE INSURANCE COMPANY,

Appellees.

Transcript of Record

Appeals from the United States District Court for the Southern District of California Southern Division.

Phillips & Van Orden Co., 4th & Berry, San Francisco, Calif.—2-6-59

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

For Appellant:

HINDMAN & DAVIS,
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636 So. Serrano Avenue,
Los Angeles 5, California.

For Appellees and Cross-Appellants Morris & Honaker:

YALE, WILSON,
SUMMERS & YALE,
WILLIAM A. YALE,
438 San Diego Trust & Svgs. Building,
San Diego 1, California.

For Appellees Insurance Companies:

THOMAS P. MENZIES,
JAMES O. WHITE, JR.,
458 So. Spring Street,
Los Angeles 13, California.

In the District Court of the United States, Southern District of California, Central Division

No. 1978-SD-C

C. R. MORRIS and CONSTANCE B. HONAKER,

Plaintiffs,

vs.

TRI-STATE MUTUAL GRAIN DEALERS FIRE INSURANCE COMPANY, a Corporation; THE HOME INSURANCE COMPANY, a Stock Company; THE CANADIAN FIRE INSURANCE COMPANY, a Stock Company,

Defendants.

PETITION FOR REMOVAL FROM STATE COURT UNDER TITLE 28, SECTION 1441 (b) and SECTION 1446, UNITED STATES JUDICIAL CODE, TO THE UNITED STATES DISTRICT COURT IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION

Comes Now the defendant The Canadian Fire Insurance Company, and for cause of removal alleges as follows:

I.

That Petitioner The Canadian Fire Insurance Company, is a resident and citizen of Winnipeg, Canada; the defendant Tri-State Mutual Grain Dealers Fire Insurance Company is a resident and

citizen of the State of Minnestota; the defendant The Home Insurance Company is a resident and citizen of the State of New York.

II.

That plaintiffs are citizens and residents of the State of California. [2*]

III.

That summons and complaint in said action has been served upon your petitioner The Canadian Fire Insurance Company on or about November 2, 1956. That said action in the Superior Court of the State of California in and for the County of San Diego is one for the recovery of money allegedly due under policy of fire insurance, and that the sum which plaintiffs are seeking to recover from your petitioner is a sum in excess of $3,000.00, exclusive of interest and costs of suit, to wit, the sum of $8,341.49.

IV.

That attached hereto and made a part of this petition is copy of the complaint and summons served upon your petitioner, and that no other papers have been served upon your petitioner and that the time to answer or appear in the above-entitled action has not expired and that 20 days have not elapsed since service of summons and complaint upon your petitioner, and that this peti-

*Page numbering appearing at foot of page of original Certified Transcript of Record.

tion will be filed within 20 days after the time of service of the complaint and summons upon your petitioner.

Wherefore, your petitioner prays:

1. That the above-entitled court make and enter its order directing the Clerk of the Superior Court of the State of California in and for the County of San Diego to take no further proceedings in said action now pending in said Superior Court of the State of California in and for the County of San Diego.

2. That this Court make and enter its order directing the removal of said action to the United States District Court in and for the Southern District of California, Central Division.

/s/ THOMAS P. MENZIES,
Attorney for Defendant and Petitioner The Canadian Fire Insurance Company. [3]

In the Superior Court of the State of California
in and for the County of San Diego

No. 2092971

C. R. MORRIS and CONSTANCE B. HONAKER,

Plaintiffs,

vs.

TRI-STATE MUTUAL GRAIN DEALERS FIRE INSURANCE COMPANY, a Corporation; THE HOME INSURANCE COMPANY, a Stock Company; THE CANADIAN FIRE INSURANCE COMPANY, a Stock Company,

Defendants.

COMPLAINT

Plaintiffs for Cause of Action Against Defendants, Allege as Follows:

I.

That defendants and each of them, are corporations doing business in the County of San Diego, State of California.

II.

That plaintiff C. R. Morris, at all times herein mentioned, was, and now is, the owner of the beneficial interest under a deed of trust encumbering that certain parcel of real property located in the County of San Diego, State of California, described as follows:

"The North 140 feet of the East 150 feet of Lot 117 of Riverview Farms, according to Map

thereof No. 1683, filed in the office of the County Recorder of said County February 25, [4] 1916."

That the unpaid indebtedness due plaintiff, C. R. Morris, under said deed of trust, at all times herein mentioned, was, and now is, the sum of $5879.28, together with interest thereon at the rate of 6% per annum from January 1, 1956.

III.

Plaintiff Constance B. Honaker, at all times herein mentioned, was, and now is, the owner of the beneficial interest of a deed of trust encumbering that certain improved parcel of real property described in Paragraph II above.

That said deed of trust in favor of plaintiff Constance B. Honaker, is subsequent to, and subordinate to the aforementioned deed of trust in favor of plaintiff C. R. Morris.

That the unpaid indebtedness due plaintiff Constance B. Honaker, under said deed of trust, was at all times herein mentioned, and now is, the sum of $2462.21, together with interest thereon at the rate of 6% per annum from June 1, 1956.

IV.

That on the 27th day of September, 1955, a building located and situate upon said real property was destroyed and damaged by fire, the exact amount and extent of said damage being unknown to plaintiffs, save and except that plantiffs are informed

and believe, and upon such information and belief allege, that said loss and damage by fire to said building was in excess of the total sums due plaintiffs collectively under their aforementioned respective deeds of trust.

V.

That on the 27th day of September, 1955, at the time of the aforementioned destruction and damage to said building by fire, defendant, Tri-Mutual Grain Dealers Fire Insurance Company, was the insurer under its policy No. 4-16532, insuring Aubrey L. Owens and Emo T. Owens against loss of said building by fire; that under and by virtue of the terms, conditions [5] and provisions of a mortgage clause attached to said policy of insurance, and forming a part thereof, plaintiffs, C. R. Morris and Constance B. Honaker were respectively designated and named as being entitled to the loss payable under said policy to the extent of their respective interests under their aforementioned deeds of trust.

VI.

That at the time of the aforementioned destruction and damage to said building by fire, to wit, on the 27th day of September, 1955, defendant, The Home Insurance Company, was the insurer under its policy No. 7502, insuring Rose Winnick Gilmore, dba as "The Corral," against loss of said building by fire; that under and by virtue of the terms, conditions and provisions of a mortgagee clause attached to said policy of insurance, and forming a part thereof, plaintiffs, C. R. Morris and Constance

B. Honaker were respectively designated and named as being entitled to the loss payable under said policy to the extent of their respective interests under their aforementioned deeds of trust.

VII.

That on the 27th day of September, 1955, at the time of the aforementioned destruction and damage to said building by fire, defendant, The Canadian Fire Insurance Company, was the insurer under its policy No. MF 104777, insuring Rose Winnick Gilmore, dba "The Corral," against loss of said building by fire; that under and by virtue of the terms, conditions and provisions of a mortgage clause attached to said policy of insurance, and forming a part thereof, plaintiffs C. R. Morris and Constance B. Honaker were respectively designated and named as being entitled to the loss payable under said policy to the extent of their respective interests under their aforementioned deeds of [6] trust.

VIII.

That on the 27th day of September, 1955, at the time of the aforementioned destruction and damage to said building by fire, the above-mentioned policies of fire insurance, and each of them, issued by the respective defendants, were in full force and effect as to the rights and interest of plaintiffs thereunder.

IX.

That all of the terms, conditions and obligations of said policies of fire insurance, and each of them,

on the part of plaintiffs to be performed, have been fully performed and complied with by said plaintiffs and each of them.

X.

That by written request, plaintiffs and each of them, have requested of defendants, and each of them, to adjust and settle under said policies of insurance, the loss payable to plaintiffs by reason of the aforementioned destruction and damage to said building by fire; that although said request has been made, defendants, and each of them, have failed and refused to pay plaintiffs or either of them, the sums due plaintiffs, or any part thereof under said policies of insurance; that there is now due, owing and unpaid to the plaintiff C. R. Morris from defendants, the sum of $5879.28, together with interest thereon at the rate of 6% per annum from January 1, 1956; that there is now due, owing and unpaid to plaintiff Constance B. Honaker, from defendants, the sum of $2462.21, together with interest thereon at the rate of 6% per annum from June 1, 1956.

Wherefore, plaintiff prays judgment against the defendants and each of them:

1. That plaintiff C. R. Morris have judgment in the sum of $5879.28, together with interest thereon at the rate of 6% per annum from January 1, 1956; [7]

2. That plaintiff Constance B. Honaker have judgment in the sum of $2462.21, together with in-

terest thereon at the rate of 6% per annum from June 1, 1956;

3. That plaintiffs be awarded their costs of suit herein, together with such other and further relief as the Court deems just.

YALE, WILSON,
SUMMERS & YALE,

By /s/ WILLIAM A. YALE,
Atorneys for Plaintiffs.

Duly Verified.

[Endorsed]: Filed November 23, 1956. [8]

[Title of District Court and Cause.]

ANSWER OF DEFENDANT THE CANADIAN FIRE INSURANCE COMPANY

Comes Now the Defendant, The Canadian Fire Insurance Company, a stock company, and answering plaintiffs' complaint on file herein for itself alone and not for its co-defendants or any of them admits, denies, and alleges as follows:

I.

Admits the allegations contained in Paragraph I.

II.

Defendant here answering does not have sufficient knowledge, information, or belief either to admit or

deny the allegations contained in Paragraph II; and, basing this answer on that ground, denies said allegations and each of them, both generally and specifically, and on that ground specifically denies that said plaintiffs own a [11] beneficial interest in the property therein mentioned in the sum of $5,879.28 or in any other sum or amount whatsoever or at all.

III.

Defendant here answering does not have sufficient knowledge, information, or belief either to admit or deny the allegations contained in Paragraph III; and, basing this answer on that ground, denies said allegations and each of them, both generally and specifically, and on that ground specifically denies that said plaintiff Constance B. Honaker owns a beneficial interest in the property therein mentioned in the sum of $2,462.21 or in any other sum or amount whatsoever or at all.

IV.

Answering Paragraph IV, admits that a fire occurred on a building situated upon the real property therein mentioned. Defendant here answering does not have sufficient knowledge, information, or belief either to admit or deny plaintiffs' allegations respecting the amount of said damage to said building; and, basing this answer on that ground, denies that said building was damaged in the amount set forth in plaintiffs' complaint or in any other amount whatsoever or at all.

V.

Admits the allegations contained in Paragraph V.

VI.

Denies generally and specifically each and every, all and singular, the allegations contained in Paragraphs VI and VII.

Defendant alleges that it did prepare a policy of insurance wherein plaintiffs were designated as loss payees, and alleges on information and belief that the Home Insurance Company did prepare a similar policy. Defendant, however, alleges that said policies of insurance of this answering defendant and of the Home Insurance Company were not in force or effect at the time of the alleged loss; that said policies of insurance had never been delivered; that [12] Rose Winnick Gilmore, who was named as the insured under said policies of insurance, did not have an insurable interest in said property; that title to said property never passed to the named insured of said policies of insurance, to wit, Rose Winnick Gilmore; and therefore title had not passed to plaintiffs at the time of the alleged loss.

VII.

Denies generally and specifically each and every, all and singular, the allegations contained in Paragraph VIII, except that defendant admits that the policy of insurance of defendant Tri-State Mutual Grain Dealers Fire Insurance Company was in full force and effect at the times mentioned in plaintiffs' complaint.

VIII.

Denies generally and specifically each and every, all and singular, the allegations contained in Paragraph IX insofar as this answering defendant is concerned. This answering defendant does not have sufficient knowledge, information, or belief either to admit or deny plaintiffs' allegations that the terms or conditions or obligations under the policies of fire insurance allegedly issued by its co-defendants had been performed or complied with.

IX.

Denies generally and specifically each and every, all and singular, the allegations contained in Paragraph X; and, except as herein specifically admitted, denies that there is now due, owing, or unpaid to plaintiff C. R. Morris from this answering defendant the sum of $5,879.28 or any other sum or amount whatsoever or at all; and specifically denies that there is now due, owing, or unpaid to plaintiff Constance B. Honaker from this answering defendant the sum of $2,462.21 or any other sum or amount whatsoever or at all.

Specifically denies that there was any loss payable to plaintiffs or either of them by this answering defendant by reason of any destruction or damage to the building mentioned in plaintiffs' [13] complaint. Admits that this answering defendant has refused to pay plaintiffs or either of them.

Further Answering Plaintiffs' Complaint and for a First, Separate Defense Thereto, Defendant Allleges:

I.

That the policy of insurance of this answering defendant was never delivered to plaintiffs or either of them or to the person named as the insured in said policy, to wit, Rose Winnick Gilmore, or to any agent of said plaintiffs or either of them or to any agent of said Rose Winnick Gilmore.

Further Answering Plaintiffs' Complaint and for a Second Separate Defense Thereto, Defendant Alleges:

I.

The policy of insurance herein sued upon provides that the named insured therein is Rose Winnick Gilmore.

Said policy of insurance further provides in part as follows: "Loss, if any, shall be adjusted with the insured specifically named, unless otherwise specified by (a) written agreement or (b) endorsement hereon."

That said policy of insurance does not specify any person other than the specifically named insured, to wit, Rose Winnick Gilmore, with whom any loss shall be adjusted.

Further Answering Plaintiffs' Complaints and for a Third Separate and Affirmative Defense Thereto, Defendant Alleges:

I.

This answering defendant is informed and believes and on that ground alleges that at the time of the alleged loss set forth in plaintiffs' complaint, the ownership of said property had not passed to Rose Winnick Gilmore, who is named as the insured in the [14] policy of insurance sued upon by plaintiffs; and that, therefore, plaintiffs or either of them did not have any title to said property under Rose Winnick Gilmore.

II.

Plaintiffs are informed and believe and therefore allege that at the time of the alleged loss plaintiffs' interest, if any, in said property was insured under a policy of insurance issued to the then owner thereof by defendant Tri-State Mutual Grain Dealers Fire Insurance Company, and that their loss, if any, is covered under said policy of insurance and not under any policy of insurance of this answering defendant.

Further Answering Plaintiffs' Complaint and for a Fourth, Separate and Affirmative Defense Thereto, Defendant Alleges:

I.

The policy of insurance herein sued upon provides in part as follows:

"Requirements in Case Loss Occurs. The insured shall give written notice to this company of any loss without unnecessary delay, protect the property from further damage, forthwith separate the damaged and undamaged personal property, put it in the best possible order, furnish a complete inventory of the destroyed, damaged and undamaged property, showing in detail quantities, costs, actual cash value and amount of loss claimed; and within 60 days after the loss, unless such time is extended in writing by this company, the insured shall render to this company a proof of loss, signed and sworn to by the insured, stating the knowledge and belief of the insured as to the following: the time and origin of the loss, the interest of the insured and of all others in the property, the actual cash value of each item thereof and the amount of loss thereto, * * *"

And said policy further provides in part: [15]

"When Loss Payable. The amount of loss for which this company may be liable shall be payable 60 days after proof of loss, as herein provided, is received by this company and ascertainment of the loss is made either by agreement between the insured and this company expressed in writing or by the filing with this company of an award as herein provided."

II.

That no proof of loss was rendered to defendant within sixty days after the alleged loss or any time by the plaintiffs or either of them or by Rose Win-

nick Gilmore, which proof of loss is a condition precedent to recovery under said policy.

III.

Plaintiffs' action is prematurely brought in that no proof of loss has been submitted to defendant, nor has ascertainment of the loss been made either by agreement or by the filing of an award as set forth in said policy of insurance.

Further Answering Plaintiffs' Complaint and for a Fifth, Separate and Affirmative Defense Thereto, Defendant Alleges:

I.

The policy of insurance herein sued upon provides in part as follows:

"Suit. No suit or action on this policy for the recovery of any claim shall be sustainable in any court of law or equity unless all the requirements of this policy shall have been complied with, and unless commenced within 12 months next after inception of the loss."

II.

The alleged date of the loss as set forth in plaintiffs' complaint was the 27th day of September, 1955. The instant action was filed on September 27, 1956, and thus said action was not commenced within twelve months next after the inception of the loss, if any. [16]

Wherefore, defendant prays that plaintiffs take nothing by reason of their complaint and that de-

fendant be hence dismissed with its costs of suit herein incurred and for such other and further relief as to the court may seem just.

/s/ THOMAS P. MENZIES,
Attorney for Defendant

Affidavit of service my mail attached.

[Endorsed]: Filed November 27, 1956. [17]

[Title of District Court and Cause.]

ANSWER

Comes Now Defendant Tri-State Mutual Grain Dealers Fire Insurance Company, a corporation, and for answer to Plaintiffs' Complaint alleges:

I.

As to the allegations of Sub-paragraph 2 of Paragraph II of said Complaint, states that it is without knowledge or information sufficient to form a belief as to the truth of the averments contained in said Sub-paragraph.

II.

As to the allegations of Sub-paragraph 3 of Paragraph III of said Complaint, states that it is without knowledge or information sufficient to form a belief as to the truth of the averments of said Sub-paragraph. [19]

III.

As to the allegations of Paragraph IV of said Complaint, denies that said loss and damage by fire

to said building was in excess of the total sums due Plaintiffs collectively under their respective deeds of trust and denies that the loss and damage was in any other or greater sum than the sum of $7,428.96

IV.

As to the allegations of Paragraph V of said Complaint, denies the same.

V.

As to the allegations of Paragraph VIII of said Complaint, denies said allegations.

VI.

As to the allegations of Paragraph IX of said Complaint, denies said allegations.

VII.

As to the allegations of Paragraph X of said Complaint, denies that there is now or was at the time of the commencement of the foregoing entitled action, or at any other time at all, due, owing or unpaid to Plaintiff C. R. Morris the sum of $5,879.28, or any other sum at all, or due, owing or unpaid to Plaintiff Constance B. Honaker from Defendant the sum of $2,462.21, or any other sum at all.

Further Pleading and as a Further and Separate Defense to Plaintiffs' Complaint, This Defendant Alleges:

I.

That on or about June 25th, 1955, this Defendant executed and delivered to Aubrey L. Owens and

Emma T. Owens, his wife, its policy of insurance, insuring in an amount not exceeding $7,000.00, a certain building situate Woodside Avenue on west side of Cajon Avenue, 7/10 of a mile south of Lakeside, California, and provided [20] therein that loss, if any, under said policy to be payable to Plaintiffs herein as their respective interests appear.

II.

That on or about September 1st, 1955, for a valuable consideration, said Aubrey L. Owens and Emma T. Owens sold and transferred and delivered possession to Jack W. Gilmore and Rose Winnick Gilmore, his wife, the aforesaid building and the realty upon it was situated and said Jack W. Gilmore and Rose Winnick Gilmore took possession under the terms of said sale on said September 1st, 1955, and continued and were in possession thereof on the 27th day of September, 1955, at which time said property was damaged by fire.

Further Pleading and as a Second Further and Separate Defense to Plaintiffs' Complaint, this Defendant Alleges:

I.

Repeats and by reference thereto makes a part hereof as though fully set forth herein the allegations of the foregoing and First Further Defense and each and every allegation therein contained.

II.

That after the sale of said property and the delivery of possession thereof as above alleged, and

on or about September 2nd, 1955, the said Aubrey L. Owens and Emma T. Owens, in accordance with the terms of the aforementioned policy of insurance, which was in the statutory form, requested of this Defendant the cancellation of said policy and the return of the unearned premium thereon to them.

Further Pleading and as a Third Further and Separate Defense to Plaintiffs' Complaint, This Defendant Alleges:

I.

Repeats and by reference thereto makes a part hereof as though fully set forth herein each and every allegation in [21] the foregoing First and Second Further and Separate Defenses.

II.

That after the foregoing sale and delivery of possession of the property above described, Plaintiff C. R. Morris agreed with this Defendant that the foregoing policy of insurance be cancelled upon the procurement by the purchasers of other insurance insuring him as loss payee in the same or similar terms as the policy of insurance of this Defendant above referred to.

III.

That the aforesaid purchasers of said property did procure other insurance, to wit, $5,000.00 with the Defendant The Home Insurance Company and $5,000.00 with the Defendant The Canadian Fire

Insurance Company, which policies provided, as did this Defendant's cancelled policy, that loss thereunder be payable to the Plaintiffs as their respective interests may appear at the time of loss and said policies were in full force and effect on the date of said loss, to wit, on the 27th day of September, 1955.

Further Pleading and as a Fourth Further and Separate Defense to Plaintiffs' Complaint, This Defendant Alleges:

I.

That in this Defendant's policy of insurance, as above alleged, and in accordance with the terms and conditions of the Statutes of this State, it was provided:

"This company shall not be liable for a greater proportion of any loss than the amount hereby insured shall bear to the whole insurance covering the property against the peril involved, whether collectible or not."

II.

That at the time of the loss alleged in Plaintiffs' Complaint, the whole insurance, if the policy of this Defendant was in effect at all, was the aforesaid $5,000.00 with The Home [22] Insurance Company and $5,000.00 with The Canadian Fire Insurance Company and Defendant's policy of $7,000.00, making the whole insurance $17,000.00, and this Defendant, if its policy was in effect at all, became

liable for no greater proportion of the loss than $7,000.00 bears to $17,000.00, or 7/17 of the loss, if any.

Wherefore, this Defendant prays that Plaintiffs take nothing by their Complaint and that it go hence and have and recover its costs and disbursements herein.

/s/ E. EUGENE DAVIS;
HINDMAN & DAVIS;

By /s/ E. EUGENE DAVIS,
Attorney for Defendant, Tri-State Mutual Grain Dealers Fire Insurance Company.

Affidavit of service by mail attached.

[Endorsed]: Filed January 17, 1957. [23]

[Title of District Court and Cause.]

ANSWER OF DEFENDANT, THE HOME INSURANCE COMPANY

Comes Now the Defendant, The Home Insurance Company, a stock company, and answering plaintiffs' complaint on file herein for itself alone and not for its co-defendants or any of them admits, denies, and alleges as follows:

I.

Admits the allegations contained in Paragraph I.

II.

Defendant here answering does not have sufficient knowledge, information, or belief either to admit or deny the allegations contained in Paragraph II; and, basing this answer on that ground, denies said allegations and each of them, both generally and specifically, and on that ground specifically denies that said plaintiffs own a beneficial interest in the property therein mentioned in the sum of [28] $5,879.28 or in any other sum or amount whatsoever or at all.

III.

Defendant here answering does not have sufficient knowledge, information, or belief either to admit or deny the allegations contained in Paragraph III; and, basing this answer on that ground, denies said allegations and each of them, both generally and specifically, and on that ground specifically denies that said plaintiff Constance B. Honaker owns a beneficial interest in the property therein mentioned in the sum of $2,462.21, or in any other sum or amount whatsoever or at all.

IV.

Answering Paragraph IV, admits that a fire occurred on a building situated upon the real property therein mentioned. Defendant here answering does not have sufficient knowledge, information, or belief either to admit or deny plaintiffs' allegations respecting the amount of said damage to said building; and, basing this answer on that ground, denies that said building was damaged in the amount set

forth in plaintiffs' complaint or in any other amount whatsoever or at all.

V.

Admits the allegations contained in Paragraph V.

VI.

Denies generally and specifically each and every, all and singular, the allegations contained in Paragraphs VI and VII.

Defendant alleges that it did prepare a policy of insurance wherein plaintiffs were designated as loss payees, and alleges on information and belief that The Canadian Fire Insurance Company did prepare a similar policy. Defendant, however, alleges that said policies of insurance of this answering defendant and of The Canadian Fire Insurance Company were not in force or effect at the time of the alleged loss; that said policies of insurance had never been delivered; that Rose Winnick Gilmore, who was named as the insured under said [29] policies of insurance, did not have an insurable interest in said property; that title to said property never passed to the named insured or said policies of insurance, to wit, Rose Winnick Gilmore; and therefore title had not passed to plaintiffs at the time of the alleged loss.

VII.

Denies generally and specifically each and every, all and singular, the allegations contained in Paragraph VIII, except that defendant admits that the

policy of insurance of defendant Tri-State Mutual Grain Dealers Fire Insurance Company was in full force and effect at the times mentioned in plaintiffs' complaint.

VIII.

Denies generally and specifically each and every, all and singular, the allegations contained in Paragraph IX insofar as this answering defendant is concerned. This answering defendant does not have sufficient knowledge, information, or belief either to admit or deny plaintiffs' allegations that the terms or conditions or obligations under the policies of fire insurance allegedly issued by its co-defendants had been performed or complied with.

IX.

Denies generally and specifically each and every, all and singular, the allegations contained in Paragraph X; and, except as herein specifically admitted, denies that there is now due, owing, or unpaid to plaintiff C. R. Morris from this answering defendant the sum of $5,879.28 or any other sum or amount whatsoever or at all; and specifically denies that there is now due, owing, or unpaid to plaintiff Constance B. Honaker from this answering defendant the sum of $2,462.21 or any other sum or amount whatsoever or at all.

Specifically denies that there was any loss payable to plaintiffs or either of them by this answering defendant by reason of any destruction or damage to the building mentioned in plaintiffs' complaint.

Admits that this answering defendant has refused to pay [30] plaintiffs or either of them.

Further Answering Plaintiffs' Complaint and for a First, Separate Defense Thereto, Defendant Alleges:

I.

That the policy of insurance of this answering defendant was never delivered to plaintiffs or either of them or to the person named as the insured in said policy, to wit, Rose Winnick Gilmore, or to any agents of said plaintiffs or either of them or to any agent of said Rose Winnick Gilmore.

Further Answering Plaintiffs' Complaint and for a Second, Separate Defense Thereto, Defendant Alleges:

I.

The policy of insurance herein sued upon provides that the named insured therein is Rose Winnick Gilmore.

Said policy of insurance further provides in part as follows: "Loss, if any, shall be adjusted with the insured specifically named, unless otherwise specified by (a) written agreement or (b) endorsement hereon."

That said policy of insurance does not specify any person other than the specifically named insured, to wit, Rose Winnick Gilmore, with whom any loss shall be adjusted.

Further Answering Plaintiffs' Complaint and for a Third, Separate and Affirmative Defense Thereto, Defendant Alleges:

I.

This answering defendant is informed and believes and on that ground alleges that at the time of the alleged loss set forth in plaintiffs' complaint, the ownership of said property had not passed to Rose Winnick Gilmore, who is named as the insured in the policy of insurance sued upon by plaintiffs; and that, therefore, [31] plaintiffs or either of them did not have any title to said property under Rose Winnick Gilmore.

II.

Defendant is informed and believes and therefore alleges that at the time of the alleged loss plaintiffs' interest, if any, in said property was insured under a policy of insurance issued to the then owner thereof by defendant Tri-State Mutual Grain Dealers Fire Insurance Company, and that their loss, if any, is covered under said policy of insurance and not under any policy of insurance of this answering defendant.

Further Answering Plaintiffs' Complaint and for a Fourth, Separate and Affirmative Defense Thereto, Defendant Alleges:

I.

The policy of insurance herein sued upon provides in part as follows:

"Requirements in Case Loss Occurs. The insured shall give written notice to this company of any loss without unnecessary delay, protect the property from further damage, forthwith separate the damaged and undamaged personal property, put it in the best possible order, furnish a complete inventory of the destroyed, damaged and undamaged property, showing in detail quantities, costs, actual cash value and amount of loss claimed; and within 60 days after the loss, unless such time is extended in writing by this company, the insured shall render to this company a proof of loss, signed and sworn to by the insured, stating the knowledge and belief of the insured as to the following: the time and origin of the loss, the interest of the insured and of all others in the property, the actual cash value of each item thereof and the amount of loss thereto * * *"

And said policy further provides in part:

"When Loss Payable. The amount of loss for which this [32] company may be liable shall be payable 60 days after proof of loss, as herein provided, is received by this company and ascertainment of the loss is made either by agreement between the insured and this company expressed in writing or by the filing with this company of an award as herein provided."

II.

That no proof of loss was rendered to defendant within sixty days after the alleged loss or any time

by the plaintiffs or either of them or by Rose Winnick Gilmore, which proof of loss is a condition precedent to recovery under said policy.

III.

Plaintiffs' action is prematurely brought in that no proof of loss has been submitted to defendant, nor has ascertainment of the loss been made either by agreement or by the filing of an award as set forth in said policy of insurance.

Further Answering Plaintiffs' Complaint and for a Fifth, Separate and Affirmative Defense Thereto, Defendant Alleges:

I.

The policy of insurance herein sued upon provides in part as follows:

"Suit. No suit or action on this policy for the recovery of any claim shall be sustainable in any court of law or equity unless all the requirements of this policy shall have been complied with, and unless commenced within 12 months next after inception of the loss."

II.

The alleged date of the loss as set forth in plaintiffs' complaint was the 27th day of September, 1955. The instant action was filed on September 27, 1956, and thus said action was not commenced within twelve months next after the inception of the loss, if any. [33]

Wherefore, defendant prays that plaintiffs take nothing by reason of their complaint and that defendant be hence dismissed with its costs of suit herein incurred and for such other and further relief as to the court may seem just.

/s/ THOMAS P. MENZIES,
Attorney for Defendants.

Affidavit of Service by Mail attached.

[Endorsed]: Filed February 11, 1957. [34]

[Title of District Court and Cause.]

AMENDED PRETRIAL STIPULATION

Section I.

The following facts are admitted by and between the parties to this action:

1. That on the 27th day of September, 1955, a building located upon real property described as the North 140 feet of Riverview Farms in the County of San Diego, State of California, was damaged by fire.

2. That at the time of said fire, Rose W. Gilmore was in possession of said premises as purchaser from Aubrey L. Owens and Emo T. Owens, under a then pending escrow agreement.

3. That at the time of said fire loss, plaintiffs were respectively the beneficiaries of first and sec-

ond deeds of trust encumbering said real property. [36]

4. That prior to said fire loss, defendant, Tri-State Mutual Grain Dealers Fire Insurance Company (hereinafter referred to as Tri-State Company), was the insurer under their policy No. 4—16532, insuring against loss of said building by fire; that plaintiffs were respectively designated and named in a mortgagee clause attached to said policy as being named as loss payees to the loss payable thereunder.

5. That on December 3, 1955, plaintiff, C. R. Morris, filed proof of loss of his claim with defendant, Tri-State Company. That on April 3, 1956, plaintiff, Constance B. Honaker, filed proof of loss of her claim with defendant, Tri-State Company.

6. That prior to said fire loss, defendant, The Home Insurance Company (hereinafter referred to as The Home Company), did prepare its policy of insurance No. 7502, insuring against loss of said building wherein plaintiffs were respectively designated and named as beneficiaries in a mortgagee clause attached to said policy as being named as loss payees to the loss payable thereunder.

7. That prior to said fire loss, defendant, The Canadian Fire Insurance Company (hereinafter referred to as Canadian Company), did prepare its policy of insurance No. MF-104 777, insuring against loss of said building wherein plaintiffs were respectively designated and named as beneficiaries in

a mortgagee clause as being named as loss payees to the loss payable thereunder.

8. That defendants, Home Company and Canadian Company, collected and received from Rose W. Gilmore, a premium for their respective insurance policies above mentioned. That on March 5, 1956, defendants, Home Company and Canadian Company, mailed to said Rose W. Gilmore, a notice of cancellation of said policy, and did retain a portion of the premium so paid by Rose W. Gilmore.

9. The Home Company and Canadian Company policies were delivered to the named insured, Rose W. Gilmore. Neither of [37] said policies was delivered to Plaintiffs or either of them.

10. No proof of loss was rendered to Defendants, Home Company and Canadian Company, by the insured Rose W. Gilmore, or by Plaintiffs or either of them.

11. No money consideration passed between Rose W. Gilmore and Plaintiffs, C. R. Morris and Constance B. Honaker. The consideration, if any, which passed between Rose W. Gilmore and Plaintiffs arose by reason of the terms of the Trust Deed in favor of plaintiffs, and the contract and escrow instruction relating to the Agreement to Purchase said real property by Rose W. Gilmore. The Trust Deed in favor of Plaintiffs was executed and recorded prior to the Agreement to Purchase by said Rose W. Gilmore.

12. The Tri-State policy was in force and effect as to Plaintiffs' interests at the time of said loss.

13. The sum due Plaintiff, C. R. Morris, at the time of said loss on the promissory note, secured by the First Deed of Trust encumbering said real property, was the sum of $5,790.39; the sum due Plaintiff, Constance B. Honaker, at the time of said loss on the promissory note secured by the Second Deed of Trust encumbering said real property, was the sum of $2,357.68, the combined sums due plaintiffs at the time of said loss being $8,-148.07.

14. The loss occasioned by said fire was the sum of $7,890.00.

Section II.

The issues of law which remain to be tried are as follows:

1. If the policies of all defendants are found to be in effect at the time of said loss, should the loss be apportioned between them, and if so, in what manner.

2. Issues of law raised by defendants, Home Company and Canadian Company, are as follows:

(a) Home Company and Canadian Company policies were not in [38] effect as to plaintiffs' interest at the time of loss.

(b) That plaintiffs' causes of action are barred by provisions contained in the Canadian Company and Home Company policies as follows: "loss, if

any, shall be adjusted with the insured specifically named, unless otherwise specified by (a) written agreement, or (b) endorsement thereon."

(c) That the named insured, Rose W. Gilmore, did not have title to the subject property, and as such, plaintiffs or either of them, had no title to said property under Rose W. Gilmore.

(d) That the loss, if any, of plaintiffs' interest was insured by defendant, Tri-State Company.

(e) The action herein was prematurely brought by reason of the fact that neither the insured, Rose W. Gilmore, or plaintiff, or either of them, rendered proof of loss to Defendants, Home Company and Canadian Company.

(f) Plaintiffs' action is barred by the limitation period prescribed in Home Company and Canadian Company policies, the date of loss being September 27, 1955, and the date of filing of Plaintiffs' complaint, September 27, 1956.

Section III.

Miscellaneous stipulations and list of documentary evidence is as follows:

1. The parties stipulate that the Court has jurisdiction over the subject matter and the parties by reason of diversity of citizenship, plaintiffs being residents of the State of California, defendant, Tri-State Company, being a citizen of the State of Minnesota, defendant, Canadian Company, being a

citizen of Winnipeg, Canada, and defendant, Home Company, being a citizen of New York.

2. It is stipulated by all parties that the following documents my be offered by plaintiff and may be admitted in evidence without objection thereto, except, that Defendants, Home Company and Canadian Company reserve the right to object [39] to the materiality of item (j).

(a) Promissory note and deed of trust in favor of plaintiff, C. R. Morris.

(b) Promissory note and deed of trust in favor of plaintiff, Constance B. Honaker.

(c) Tri-State Company insurance policy No. 4-16532.

(d) Memorandum of Canadian Company fire insurance policy, No. MF 104 777.

(e) Certificate of insurance of the Home Company policy, No. 7502.

(f) Cancellation notice, dated March 5, 1956, prepared and delivered by defendant, Home Company.

(g) Cancellation notice, dated March 5, 1956, prepared and delivered by Canadian Company.

(h) Letter dated May 10, 1956, from Franklin Insurance Corporation, as agent for defendants, Home and Canadian Companies, addressed to Mrs. Rose W. Gilmore, notifying her of the amount of the unearned premium, to be reimbursed to her, of the above-mentioned policies.

(i) Escrow instructions between Aubrey L. Owens and Emo T. Owens, as sellers, and Rose Winnick Gilmore, as buyer.

(j) Copy of letter dated June 8, 1956, from Yale, Wilson, Summers & Yale, Attorneys for Plaintiffs, addressed to all defendants, requesting adjustment of loss on behalf of Plaintiffs.

Respectfully submitted,

YALE, WILSON,
SUMMERS & YALE,

By /s/ WILLIAM A. YALE,
Attorneys for Plaintiffs.

/s/ THOMAS P. MENZIES,
Attorney for Defendants, The Home Insurance Company and The Canadian Fire Insurance Company.

HINDMAN & DAVIS,

By /s/ E. EUGENE DAVIS,
Attorneys for Defendant, Tri-State Mutual Grain Dealers Fire Insurance Company, a Corporation.

Approved: 12/5/57.

/s/ JAMES M. CARTER,
District Judge.

[Endorsed]: Filed December 5, 1957. [40]

[Title of District Court and Cause.]

AMENDMENT TO ANSWER OF DEFENDANT TRI-STATE GRAIN DEALERS FIRE INSURANCE COMPANY

Order permitting filing Amendment to Answer having been duly made, Defendant, Tri-State Mutual Grain Dealers Fire Insurance Company, a corporation, files this amendment to its Fourth Further and Separate Defense to Plaintiffs' Complaint so that its Fourth Further and Separate Defense is amended to read as follows:

I.

That in this Defendant's policy of insurance, as above alleged, and in accordance with the terms and conditions of the Statutes of this State, it was provided:

"This company shall not be liable for a greater proportion of any loss than the amount hereby insured shall bear to the whole insurance covering the property against the peril involved, whether collectible or not." [25]

II.

And said policy further provided as follows in mortgage clause attached thereto and made a part thereof:

"5. This company shall not be liable to the mortgagee for a greater proportion of any loss than the amount hereby insured shall bear to the whole insurance covering the property against the

peril involved, under policies issued to, held by, or payable to the mortgagee, whether collectible or not."

III.

That at the time of the loss alleged in Plaintiffs' Complaint, the whole insurance covering the property described in the policy of this Defendant for loss by fire and held by and payable to the mortgagee Plaintiffs herein was in the amount of $5,000.00 with Defendant, The Home Insurance Company, and in the amount of $5,000.00 with Defendant, The Canadian Fire Insurance Company, and Defendant's policy of $7,000.00, making the whole insurance $17,000.00, and this Defendant became liable for no greater proportion of the loss than $7,000.00 bears to $17,000.00, or 7/17ths of the loss.

HINDMAN & DAVIS,

/s/ E. EUGENE DAVIS,

By /s/ E. EUGENE DAVIS,

Attorneys for Defendant, Tri-State Mutual Grain Dealers Fire Insurance Company.

Affidavit of Service by Mail attached.

[Endorsed]: Filed February 5, 1958. [26]

[Title of District Court and Cause.]

MEMORANDUM

C. R. Morris, the holder of the first trust deed securing a note with $5,790.39 due thereon, and

Constance B. Honaker, the holder of a second trust deed securing a note with $2,357.68 due thereon, sue insurance companies under loss payable clauses in favor of mortgagees, contained in fire insurance policies.

The loss occasioned by the fire was stipulated to be $7,890.00.

The fire occurred on September 27, 1955. On that date Aubrey L. Owens and Emma T. Owens were the owners of the fee. On that date Tri-State had in effect a fire insurance policy on the property naming the Owenses as owner and specifically naming Morris and Honaker under a loss payable clause. [41]

Owens had gone into escrow to sell the property to Rose Gilmore and on September 27, 1955, the date of the fire, the escrow was not closed but Gilmore had gone into possession.

Prior to the fire, the Home Company and the Canadian Company had at the request of Gilmore, delivered to her their fire policies on the same property. Such policies insured Gilmore as owner and specifically named Morris and Honaker under loss payable clauses.

Tri-State concedes its liability but claims Home and Canadian should bear their proportional share of the loss.

We conclude there is no liability on Home or Canadian.

(1) The escrow had not closed. Rose Gilmore, the assured of Home and Canadian, had no title to the real property and no insurable interest, Sec. 280 California Insurance Code.

(2) The Home and Canadian policies were to be substituted for the Tri-State policies at close of escrow and the instructions provided for prorate of premiums on Tri-State's policy. Though delivered to Gilmore they did not become effective as to Gilmore or Morris and Honaker, until the escrow closed.

(3) Until the escrow closed the Owenses were the owners and had the insurable interest, Vierneisel v. Rhode Island Ins. Co., [1946] ..... Cal. App. 2d ....., 175 Pac. 2d 63.

(4) The fact that Home and Canadian later cancelled their policies and charged Gilmore a prorated premium gives no comfort or rights to Tri-State. This was a matter entirely between Gilmore and the Home and Canadian companies. [42]

(5) It's common knowledge in connection with escrows, that new insurance to be substituted must be written or dated prior to the close of escrow. The date of close of escrow cannot often be accurately gauged. Thus, when the escrow closes, the old insurance is cancelled, premiums are prorated and rebated and the new insurance becomes effective.

(6) Sec. 1662 Civil Code cited by Tri-State merely provides who has risk of loss between pur-

chaser and vendor. It does not affect this case. Since Gilmore had gone into possession, she "is not thereby relieved from a duty to pay the price nor is (s)he entitled to recover any portion thereof that (s)he has paid." Sec. 1662 Civil Code. But she was clearly entitled to an assignment of the Tri-State Insurance. Vierneisel v. Rhode Island Ins. Co. (supra).

Here however, the loss, $7,890.00, and the payment of that sum by the insurance carrier was not even sufficient to cover the two loss payable clauses totaling $8,148.07. There was therefore nothing for her to claim from the fire insurance.

(7) It might be well to here analyze how these loss payable clauses come into existence and operate.

A party buys a home. He takes out fire insurance. If the house is clear, all the insurance is payable to him.

If there is an encumbrance on the property, then a condition of that trust deed or mortgage, uniformly requires that the owner (a) keep the property insured, and (b) provide for payment first out of the proceeds of fire insurance, to the holder of the encumbrance to the extent of his interest (the loss payable clause). [43]

Thus, whether the owner himself (1) executes the trust deed, or (2) takes the fee subject to it or (3) assumes and agrees to pay the encumbrance, it is a breach of the obligations of the trust deed and a ground for default and foreclosure if in-

surance is not kept in force with the loss payable clause.

Therefore the owner himself instructs the insurance company to insert the loss payable clause. He has in fact assigned a part of the proceeds he would otherwise obtain. Or the insurance contract as to the mortgagee-beneficiaries might be called loosely a contract for the benefit of the mortgagees as third party beneficiaries.

The essential point is that although these beneficiaries have rights and may sue the insurance company, their right depends on the validity of the insurance written for the owners. If the owner had no insurable interest then of course the owner had no rights to, in substance, assign to the mortgagees under the loss payable clauses.

(8) The policies of Canadian and Home provide specifically, "Loss, if any, shall be adjusted with the insured specially named, unless otherwise specified by (a) written agreement or (b) endorsement thereon." This is listed as issue 2(b) in the pretrial stipulation and is set up as Home and Canadian's second defense. We think it is good.

(9) Issue 2(e) of the pretrial stipulation, also Home and Canadian's fourth separate defense, raises the question as to whether the action was prematurely brought since neither the insured Gilmore nor plaintiff or either of them rendered proof of loss to defendants, Home and Canadian. We think this issue must be resolved against defend-

ants, Home and Canadian, since their policies provide that "If the insured fails to render proof of loss, such mortgagee, [44] upon notice, shall render proof of loss * * * within sixty days thereafter * * *." No notice was given to the mortgagee plaintiffs to file proof of loss.

(10) Home and Canadian contend that the action is barred by the twelve months' period of limitation set forth in their policies. The loss occurred September 27, 1955; the complaint was filed September 27, 1956. This is apparently 2(f) of the pretrial stipulation and defendant Home and Canadian's fifth defense. We think the defense bad.

Section 10 of the Civil Code and Section 12 of the Code of Civil Procedure are identical, and read: "The time in which any act provided by law is to be done is to be computed by excluding the first day, and including the last, unless the last day is a holiday, and then it is also excluded." It is true that each section refers to an act "provided by law is to be done." The sections would thus be clear as to matters such as notices of appeal, motions for new trial, etc. However, the sections have been applied to contracts and the cases have held that the first day is to be excluded, Johnson v. Kaeser [1925], 196 Cal. 686; to insurance policies, Law v. Northern Assurance Co. of London, [1913] 165 Cal. 394; promissory notes, Rauer v. Browder, [1895] 107 Cal. 282.

The laws of the state are automatically part of insurance policies. The action filed on September

27, 1956, was within the twelve months' period provided in the policy.

(11) Morris made proof of loss with Tri-State on December 3, 1955. He prays interest from January 1, 1956. Honaker made proof of loss with Tri-State on April 3, 1956. She prays interest from June 1, 1956. The amount of loss was easily susceptible of ascertainment. It was in fact stipulated to when the court pressed for a pretrial stipulation thereon. [45]

Both parties are entitled to interest as prayed, Chase v. National Indemnity Co. [1954], 129 C. A. 2d 853.

(12) The liability of Tri-State is the amount of the loss, $7,890.00. The Morris trust deed is a first. His recovery is $5,790.39 plus interest. Honaker, with the second trust deed will recover $2,099.61 plus interest. Both plaintiffs will have costs against Tri-State.

Plaintiffs will take nothing from Home or Canadian. Tri-State has actually no prayer or pleading asking relief against Home or Canadian. Its prayer asks only that plaintiffs take nothing.

By amendment to its answer filed February 5, 1958, Tri-State amends its fourth defense and alleges its liability to be only 7/17ths of the loss.

Our holding that Tri-State alone is liable disposes of this phase of the case. Canadian and Home will recover their costs.

The plaintiff will prepare, serve and lodge findings of fact, conclusions of law and judgment in one document within the time prescribed for in the Rules.

Dated: March 28, 1958

/s/ JAMES M. CARTER,
United States District Judge.

[Endorsed]: Filed March 27, 1958. [46]

In the United States District Court, Southern District of California, Southern Division

No. 1978 SD-C

C. R. MORRIS and CONSTANCE B. HONAKER,

Plaintiffs

vs.

TRI-STATE MUTUAL GRAIN DEALERS FIRE INSURANCE COMPANY, a Corporation; THE HOME INSURANCE COMPANY, a Stock Company; THE CANADIAN FIRE INSURANCE COMPANY, a Stock Company,

Defendants.

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND JUDGMENT

The above cause came on regularly for trial on February 3, 1958, before Honorable James M.

Carter, Judge, sitting without a jury, Yale, Wilson, Summers & Yale, by William A. Yale, appearing as attorneys for Plaintiffs; Hindman & Davis, by E. Eugene Davis, appearing as attorneys for defendant, Tri-State Mutual Grain Dealers Fire Insurance Company, a Corporation; and Thomas P. Menzies appearing as attorney for defendants, The Home Insurance Company, a Stock Company, and The Canadian Fire Insurance Company, a Stock Company; and a Pretrial Stipulation, together with Memoranda of Points and Authorities having been submitted by the parties, oral and documentary evidence having been introduced, and said [47] matter having been submitted for decision after oral argument, the Court being fully advised, makes the following Findings of Fact:

FINDINGS OF FACT

I.

Plaintiffs are each citizens of the State of California; defendant, Tri-State Company, is a citizen of the State of Minnesota; defendant, Home Company, is a citizen of the State of New York; defendant, Canadian Company, is a citizen of Winnipeg, Canada; that all defendants on the 27th day of September, 1955, were doing business in the State of California; that the amount in controversy exceeds the sum of $3000.00 exclusive of interest.

II.

That on the 27th day of September, 1955, a building located upon real property described as the

North 140 feet of Riverview Farms in the County of San Diego, State of California, was damaged by fire; that plaintiffs' action herein was filed on the 27th day of September, 1956; that the policies of insurance of the defendant, Home Company and Canadian Company, provided in part as follows:

"Suit

No suit or action on this policy for the recovery of any claim shall be sustainable in any court of law or equity unless all the requirements of this policy shall have been complied with, and unless commenced within 12 months next after inception of the loss."

"Mortgagee Interests and Obligations * * *

If the insured fails to render proof of loss, such mortgagee, upon notice, shall render proof of loss in the form herein specified, within sixty (60) days thereafter, and shall be subject to the provisions hereof relating to appraisal and time of payment and of bringing suit * * *" [48]

III.

That at the time of said fire, Rose W. Gilmore was in possession of said premises as purchaser from Aubrey L. Owens and Emo T. Owens, under the pending escrow agreement; that at the time of said fire loss, said escrow had not been closed, and the deed from Aubrey L. Owens and Emo T. Owens had not been delivered to Rose W. Gilmore.

IV.

That at the time of said fire loss, plaintiffs were respectively the beneficiaries of first and second deeds of trust encumbering said real property; the sum due plaintiff, C. R. Morris, at the time of said loss on the promissory note secured by the first deed of trust encumbering said real property, was the sum of $5,790.39; the sum due Constance B. Honaker at the time of said loss, on the promissory note secured by the second deed of trust encumbering said real property, was the sum of $2,357.68; the combined sums due plaintiffs at the time of said loss being $8,148.07.

V.

That on the 27th day of September, 1955, at the time of the aforementioned damage and destruction to said building by fire, defendant, Tri-State Company, was the insurer against loss or damage to said building by fire, in the sum of $7000.00, under its policy No. 4-16532; that said policy of insurance named Aubrey L. Owens and Emo T. Owens as the named insureds under said policy; that under a mortgagee clause attached to said policy of insurance, plaintiffs, C. R. Morris and Constance B. Honaker, were respectively designated and named as being entitled to the loss payable under said policy to the extent of their interests under their aforementiond deeds of trust.

VI.

That prior to said fire loss, defendant, Home Company, did prepare its policy of insurance No.

7502, in the amount of $5000.00 insuring against loss of said building by fire, wherein Rose Gilmore was designated as the insured, [49] and the plaintiffs were respectively designated and named as beneficiaries in a mortgagee clause attached to said policy as being entitled to the loss payable thereunder to the extent of their interests under their aforementioned deeds of trust.

VII.

That prior to said fire loss, defendant, Canadian Company, did prepare its policy of insurance No. MF-104 777, in the amount of $5000.00, insuring against loss of said building by fire, wherein Rose Gilmore was designated as the insured and the plaintiffs were respectively designated and named as beneficiaries in a mortgagee clause as being entitled to the loss payable thereunder to the extent of their interests under their aforementioned deeds of trust.

VIII.

That defendants, Home Company and Canadian Company, collected and received from Rose W. Gilmore, a premium for their respective insurance policies above mentioned. That on March 5, 1956, defendants, Home Company and Canadian Company, mailed to said Rose W. Gilmore, a notice of cancellation of said policy, and did retain a portion of the premium so paid by Rose W. Gilmore.

IX.

The Home Company and Canadian Company policies were delivered to the named insured, Rose

W. Gilmore prior to the fire. Neither of said policies was delivered to plaintiffs nor either of them.

X.

That on December 3, 1955, plaintiff, C. R. Morris, filed proof of loss of his claim with defendant, Tri-State Company. That on April 3, 1956, plaintiff, Constance B. Honaker, filed proof of loss of her claim with defendant, Tri-State Company. No proof of loss was rendered to defendants Home Company and Canadian Company by the insured, Rose W. Gilmore, or by plaintiffs, or either of them. [50]

XI.

No money consideration passed between Rose W. Gilmore and plaintiff, C. R. Morris, and/or Constance B. Honaker.

XII.

The loss occasioned by said fire was stipulated to be the sum of $7,890.00; that the amount of said loss was easily susceptible of ascertainment.

XIII.

That defendant, Tri-State Company, has stipulated in this case that its policy of insurance was in force and effect as to the interests of plaintiffs and each of them, at the time of said loss.

XIV.

The policy of Tri-State Company provides in part as follows:

"When Loss Payable. The amount of loss for which this Company may be liable shall be payable sixty (60) days after proof of loss, as herein provided, is received by this Company and ascertainment of the loss is made either by agreement between the insured and this Company expressed in writing, or, by the filing with this Company of an award as herein provided;"

That defendant, Tri-State failed and neglected to ascertain said loss although the same was easily susceptible of ascertainment.

XV.

That the policies of defendants, Home and Canadian Companies, provided in part as follows:

"Loss, if any, shall be adjusted with the insured specifically named, unless otherwise specified by

(a) written agreement, or

(b) endorsement thereon;"

That the loss was not adjusted by the named insured under said policies with defendants Home and Canadian Companies, nor was there a written agreement or endorsement on said policy otherwise [51] specifying the method of adjusting said loss.

XVI.

That the policies of defendants, Home and Canadian Companies, provided in part as follows:

"If the insured fails to render proof of loss, such mortgagee, upon notice, shall render proof of loss in the form herein specified, within sixty (60) days thereafter * * *"

That the named insured, Rose W. Gilmore, failed to render proof of loss under said policies. That no notice was given by defendants, Home Company and Canadian Company to mortgagee plaintiffs to render proof of loss.

XVII.

That the policy of defendant, Tri-State Company, provided in part as follows:

"This Company shall not be liable for a greater proportion of any loss than the amount hereby insured shall bear to the whole insurance covering the property against the peril involved, whether collectible or not," and,

"This Company shall not be liable to the mortgagee for a greater proportion of any loss than the amount hereby insured shall bear to the whole insurance covering the property against the peril involved under policies issued to, held by, or payable to the mortgagee, whether collectible or not."

The policies of Home Insurance Co. and Canadian Fire Insurance Co. contain provisions substantially the same.

Conclusions of Law

From the foregoing facts the Court makes the following Conclusions of Law:

1. That this Court has jurisdiction over the parties to, and the subject matter of, this action.

2. That on September 27, 1955, the date of said fire loss, Aubrey L. Owens and Emo T. Owens, were the owners in fee of said real property and had the insurable interest therein. That Rose W. Gilmore had no title to said real property and had no insurable interest therein. [52]

3. That on the date of said fire loss, defendant, Tri-State Company, had, in effect, a fire insurance policy on said real property and plaintiffs being named as mortgagees in the mortgagee clause under said policy are entitled to the loss payable thereunder.

4. That the policies of insurance prepared by Home Company and Canadian Company, although delivered to Rose W. Gilmore, were not to become effective as to Rose W. Gilmore or plaintiffs or either of them, until said escrow closed; that said policies were to be substituted for the Tri-State policy at the close of said escrow; that said escrow had not closed at the time of said loss and the policies of defendants Home Company and Canadian Company, were not in force and effect at such time.

5. That under the policies of defendants, Home Company and Canadian Company, it was necessary that the loss be adjusted with the named insured, Rose W. Gilmore.

6. That it was not necessary that plaintiffs render proof of loss to defendants, Home Company and Canadian Company, in that said defendants had not notified plaintiffs that the named insured, Rose W. Gilmore, had failed to render proof of loss.

7. That plaintiffs' action is not barred by the limitation period prescribed in the policies of defendants, Home Company and Canadian Company.

8. That plaintiffs are entitled to interest at the rate of 6% per annum from defendant, Tri-State Company on the amounts due them under this judgment, said interest to commence sixty (60) days after the filing of their respective proofs of loss with defendant, Tri-State Company.

9. That defendant, Tri-State Company alone, is liable to plaintiffs for said loss under its policy, in the sum of $7000.00; that the amount of said fire loss and the combined sums due plaintiffs on their trust deed notes at the time of said loss exceeds the amount [53] due from the defendant, Tri-State Company; that the deed of trust in favor of C. R. Morris, is a first deed of trust, and said Plaintiff is entitled to judgment in the sum of $5,790.39, together with interest thereon at the rate of 6% per annum, from February 3, 1956, to date of entry of judgment herein; plaintiff, Constance B. Honaker, is entitled to judgment for the balance of said insurance coverage in the amount of $1209.61, together with interest thereon at the rate of 6% per

annum from June 3, 1956, to the date of entry of judgment herein.

10. That Plaintiffs are entitled to their costs of suit from defendant, Tri-State Company.

11. That Plaintiffs are entitled to take nothing from defendants, Home Company or Canadian Company, and defendants, Home Company and Canadian Company, are entitled to their costs of suit from plaintiff.

12. The Court incorporates by reference as part of these findings and conclusions, its Memo of decision filed March 27, 1958, except where inconsistent with these findings and conclusions.

Judgment

It is Ordered, Adjudged and Decreed that plaintiff, C. R. Morris, have judgment against defendant, Tri-State Insurance Company, in the sum of $5790.39, together with interest at the rate of 6% per annum from June 3, 1956, to date of judgment, in the sum of $833.50, making a total judgment of $6623.89; that plaintiff Constance B. Honaker, have judgement against defendant Tri-State Insurance Company, in the sum of $1209.61, together with interest at the rate of 6% per annum from June 3, 1956, to date of judgment in the sum of $150.31, making a total judgment of $1359.92; that plaintiffs are awarded their costs of suit from defendant, Tri-State Insurance Company, in the sum of $26.45; that plaintiffs take nothing from defendants, Home

Company and Canadian Company, or either of them, and that defendants, Home Company and Canadian Company, are awarded their costs of suit from plaintiffs in the sum of .....

Dated: 6/30/58.

/s/ JAMES M. CARTER,
U. S. District Judge

Affidavit of service by mail attached.

Lodged June 24, 1958.

[Endorsed]: Filed June 30, 1958.

Entered July 3, 1958. [55]

[Title of District Court and Cause.]

MINUTES OF THE COURT

July 28, 1958

Present: Hon. James M. Carter,
District Judge.

Proceedings:

It Is Ordered that defendant Tri-State motion for new trial be, and it hereby is, denied.

(Copies to counsel)

JOHN A. CHILDRESS,
Clerk.

By /s/ WILLIAM W. LUDDY,
Deputy Clerk. [57]

[Title of District Court and Cause.]

NOTICE OF APPEAL FROM JUDGMENT

To the Above-Entitled Court and Its Clerk; and to the Plaintiffs, and Each of Them, and to Their Attorneys, Yale, Wilson, Summers & Yale; and to Defendant, The Home Insurance Company and The Canadian Fire Insurance Company, and Their Attorney, Thomas P. Menzies:

Please Take Notice that defendant, Tri-State Mutual Grain Dealers Fire Insurance Company, does hereby appeal to the United States Court of Appeals for the Ninth Circuit from the judgment, and each and every part thereof, entered in the above-entitled cause on July 3rd, 1958, in favor of plaintiffs and against this defendant.

Dated: This 21st day of August, 1958.

HINDMAN & DAVIS,

By /s/ E. EUGENE DAVIS,
Attorneys for Said Defendant
and Appellant

Affidavit of Service by Mail attached.

[Endorsed]: Filed August 22, 1958. [58]

[Title of District Court and Cause.]

BOND ON APPEAL

Know All Men by These Presents that Tri-State Mutual Grain Dealers Fire Insurance Company, a corporation, as principal, and Hartford Accident & Indemnity Company, a corporate surety, as surety, authorized to do and doing business in the State of California as a corporate surety, are held and firmly bound unto C. R. Morris and Constance B. Honaker, and each of them, plaintiffs above named, in the penal sum of $250.00, which sum well and truly to be paid to said plaintiffs, the said principal and surety above named bind themselves, their successors and assigns firmly by these presents.

The condition of the above obligation is such that,

Whereas, the above-named principal, Tri-State Mutual Grain Dealers Fire Insurance Company, has appealed or is about to appeal to the United States Court of Appeals for the Ninth Circuit from that certain judgment, and each and every part thereof, entered in [60] the above-entitled court on July 3rd, 1958, in favor of plaintiffs and against defendant, Tri-State Mutual Grain Dealers Fire Insurance Company.

Now, Therefore, if the above-named Tri-State Mutual Grain Dealers Fire Insurance Company, a corporation, shall prosecute said appeal to effect and answer all costs which may be adjudged against it if the appeal is dismissed or the judgment entered be affirmed or such costs as the appellate court may

award if the judgment be modified, then this obligation shall be void, otherwise to remain in full force and effect.

In Witness Whereof, the above-named principal and surety have caused these presents to be executed at Los Angeles, California, this 21st day of August, 1958.

TRI-STATE MUTUAL GRAIN DEALERS INSURANCE COMPANY,

By /s/ E. EUGENE DAVIS,
Its Attorney.

HARTFORD ACCIDENT & INDEMNITY COMPANY,

By /s/ CLARA VENTSAM,
Attorney in Fact.

State of California,
County of Los Angeles—ss.

On this 21st day of August, in the year 1958, before me, Lillian L. Barnes, a Notary Public in and for said County, residing therein, duly commissioned and sworn, personally appeared Clara Ventsam, known to me to be the Attorney-in-Fact of the Hartford Accident and Indemnity Company, the Corporation described in and that executed the within instrument, and also known to me to be the person who executed it on behalf of the Corporation therein named, and she acknowledged to me that such Corporation executed the same.

In Witness Whereof, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

/s/ LILLIAN L. BARNES,
Notary Public in and for the County of Los Angeles, State of California.

My Commission Expires October 31, 1961.

Affidavit of Service by Mail attached.

[Endorsed]: Filed August 22, 1958. [61]

[Title of District Court and Cause.]

STATEMENT OF APPELLANT'S POINTS ON APPEAL

I.

The Court erred in finding that Appellant's limit of liability was not limited to the proportion of the loss that the amount of its insurance bore to all the other insurance on the property at the time of the loss.

II.

The Court erred in finding that the policies of insurance executed and delivered by Home Insurance Company and Canadian Fire Insurance Company were not in full force and effect at the time of the loss.

III.

The Court erred in finding that Rose Gilmore did not have an insurable interest in the property at the time of the loss.

IV.

The Court erred in finding that the amount of the loss was easily ascertainable. [66]

V.

The Court erred in assessing interest against Appellant.

VI.

The Court erred in its conclusion that Rose Gilmore had no insurable interest in the property destroyed.

VII.

The Court erred in finding and concluding that policies of insurance of Home Insurance Company and Canadian Fire Insurance Company were not in force and effect at the time of the fire.

/s/ E. EUGENE DAVIS,

HINDMAN & DAVIS,

By /s/ E. EUGENE DAVIS,

Attorneys for Defendant and Appellant Tri-State Mutual Grain Dealers Fire Insurance Company.

Affidavit of Service by Mail attached.

[Endorsed]: Filed August 27, 1958. [67]

[Title of District Court and Cause.]

NOTICE OF CROSS-APPEAL BY PLAINTIFFS FROM PART OF JUDGMENT

To the Above-Entitled Court and its Clerk, and to the Defendants, The Home Insurance Company,

and The Canadian Fire Insurance Company, and Their Attorney, Thomas P. Menzies, and Defendant, Tri-State Mutual Grain Dealers Fire Insurance Company, and its Attorneys, Hindman & Davis:

Notice is Hereby Given, that Plaintiffs, C. R. Morris and Constance B. Honaker, hereby cross-appeal to the United States Court of Appeals for the 9th Circuit, from a part of the judgment entered in this action on July 3, 1958, the part of said judgment hereby appealed from is the portion thereof wherein it was ordered, adjudged and decreed that Plaintiffs take nothing [69] from Defendants, The Home Insurance Company and The Canadian Fire Insurance Company, or either of them, and that Defendants, The Home Insurance Company and The Canadian Fire Insurance Company were awarded their costs of suit from Plaintiffs.

Dated: August 27, 1958.

YALE, WILSON,
SUMMERS & YALE,

By /s/ WILLIAM A. YALE,
Attorneys for Plaintiffs and Cross-Appellants C. R. Morris and Constance B. Honaker.

Affidavit of Service by Mail attached.

[Endorsed]: Filed August 27, 1958. [70]

[Title of District Court and Cause.]

BOND ON APPEAL

Know All Men by These Presents, that C. R. Morris and Constance B. Honaker, as principals, and Fidelity and Deposit Company of Maryland, a corporate surety, as surety, authorized to do and doing business in the State of California, as a corporate surety, are held and firmly bound unto The Home Insurance Company and The Canadian Fire Insurance Company, and each of them, Defendants above named, in the penal sum of $250.00, which sum well and truly to be paid to said defendants, the said principal and surety above named bind themselves, their successors and assigns firmly by these presents.

The condition of the above obligation is such that,

Whereas, the above-named principals, C. R. Morris and Constance B. Honaker, have appealed or are about to appeal to the United States Court of Appeals for the Ninth Circuit from a part of that certain judgment entered in the above-entitled Court on July 3, 1958, the part appealed from being in favor of Defendants, The Home Insurance Company and The Canadian Fire Insurance Company.

Now, Therefore, if the above-named Plaintiffs, C. R. Morris and Constance B. Honaker, shall prosecute said appeal to effect and answer all costs which may be adjudged against them if the appeal

is dismissed or the judgment entered be affirmed or such costs as the appellate court may award if the judgment be modified, then this obligation shall be void, otherwise to remain in full force and effect.

In Witness Whereof, the above-named principals and surety have caused these presents to be executed at San Diego, California, this 27th day of August, 1958.

C. R. MORRIS &
CONSTANCE B. HONAKER,
Plaintiffs,

By /s/ WILLIAM A. YALE,
Their Attorney.

FIDELITY & DEPOSIT
COMPANY OF MARYLAND,

By /s/ JAMES W. SURRY,
Attorney in Fact.

Affidavit of Service by Mail attached.

[Endorsed]: Filed August 27, 1958. [73]

[Title of District Court and Cause.]

STATEMENT OF CROSS-APPELLANTS' POINTS ON APPEAL

I.

The Court erred in finding that the policies of insurance executed and delivered by Home Insurance

Company and Canadian Fire Insurance Company were not in full force and effect at the time of the loss.

II.

The Court erred in finding that Rose Gilmore did not have an insurable interest in the property at the time of the loss.

III.

The Court erred in its conclusion that Rose Gilmore had no insurable interest in the property [77] destroyed.

IV.

The Court erred in finding and concluding that policies of insurance of Home Insurance Company and Canadian Fire Insurance Company were not in force and effect at the time of the fire.

YALE, WILSON,
SUMMERS & YALE,

By /s/ WILLIAM A. YALE,
Attorneys for Plaintiffs and
Cross-Appellants.

Affidavit of Service by Mail attached.

[Endorsed]: Filed September 10, 1958. [78]

In the District Court of the United States, Southern District of California, Southern Division

No. 1978-SD-C

C. R. MORRIS and CONSTANCE B. HONAKER,

Plaintiffs,

vs.

TRI-STATE MUTUAL GRAIN DEALERS FIRE INSURANCE COMPANY, a Corporation; THE HOME INSURANCE COMPANY, a Stock Company; THE CANADIAN FIRE INSURANCE COMPANY, a Stock Company,

Defendants.

Honorable James M. Carter, Judge Presiding.

REPORTER'S TRANSCRIPT OF TRIAL
February 3, 1958

Appearances of Counsel

For Plaintiffs:

YALE, WILSON, SUMMERS & YALE,
WILLIAM A. YALE, ESQ.,
438 San Diego Trust & Savings,
San Diego 1, California.

For Defendant The Canadian Fire Insurance Company:

THOMAS P. MENZIES, ESQ.,
803 Rowan Building,
458 South Spring Street,
Los Angeles 13, California.

For Defendant Tri-State Mutual Grain Dealers Fire Insurance Company:
HINDMAN & DAVIS, by
E. EUGENE DAVIS, ESQ.,
636 South Serrano Ave,
Los Angeles 5, California.

The Clerk: No. 1978-SD-C, C. R. Morris, et al., vs. Tri-State Mutual, etc., et al. For trial.

Mr. Yale: Ready on behalf of plaintiffs C. R. Morris and Constance B. Honaker.

Mr. Menzies: Ready for Canadian Home, your Honor.

Mr. Davis: Ready for Tri-State Mutual, your Honor, except that I would like to offer an amendment to my Answer. I think it is probably considered amended anyway.

At page 4 of the Answer, the first paragraph, the affirmative defense, on line 21, I would like to add the following, which has already been discussed in the memorandum filed in October and was inadvertently omitted from this paragraph:

> "That said policy also contained the following provision: 'This company shall not be liable to the mortgagee for a greater proportion of any loss than the amount hereby insured shall bear to the whole insurance covering the property against the peril involved under policies issued to, held by or payable to the mortgagee, whether collectible or not.' "

I move that my Answer be amended by adding that

phrase. It is [3*] in the policy that it is stipulated will be introduced.

The Court: The motion will be granted. You may amend by filing a separate amendment, because the Clerk cannot get this down and there is not room to interline here. File a separate amendment to paragraph I of your fourth defense. You may do that within five days.

Mr. Yale: May I suggest, your Honor, to expedite the matter, that he is merely incorporating a provision of the policy. Plaintiffs would be pleased to stipulate that he may incorporate all provisions of the policy in his Answer, to facilitate the matter.

Mr. Davis: I am perfectly willing, although that may——

The Court: It is a simple matter to have somebody type this amendment and file it with the clerk.

Proceed.

Mr. Yale: If the Court please, I have discussed the matter with both counsel for the defendants this morning, and it seems to be fairly well agreed between all of us that the factual situations have been disposed of by the Amended Pretrial Stipulation. Actually, there are no further facts to be resolved or disposed of in this matter. I think it is fortunate that we have been able to agree upon the facts involved, and counsel seem to be of the belief that, on the basis of the memorandums that have been filed, the matter [4] should be submitted. However, I am perfectly pleased to argue the matter at this time.

***Page numbering appearing at top of page of original Reporter's Transcript of Record.**

The Court: None of your documents is in evidence.

Mr. Yale: With one exception, I have all the exhibits at this time, if the Court please.

The Court: Hand them to the Clerk. Do they run from A to J, as set forth in the Pretrial Stipulation?

Mr. Yale: I have not marked them as such.

The Court: Hand them to the Clerk and he will mark them in that order.

First is the promissory note in favor of plaintiff Morris.

Mr. Yale: That and the deed of trust in favor of Morris could be considered as one exhibit.

The Court: All right. It is not the ordinary practice, but so that we will have the same numbers as appear in the stipulation, we will call that Exhibit A.

Mr. Yale: The next would be the promissory note and deed of trust in favor of plaintiff Constance Honaker. They are offered as one exhibit.

The Court: They are received as Plaintiff's Exhibit B.

Mr. Yale: Next would be the policy of insurance in Tri-State Mutual.

The Court: Exhibit C, received in evidence. [5]

Mr. Yale: Next would be what is called a Memorandum of Insurance of the Canadian Fire Insurance Company.

The Court: Exhibit D in evidence.

Mr. Yale: Next would be this Certificate of Insurance of the Home Insurance Company.

The Court: Exhibit E in evidence.

Mr. Yale: Next would be the Notice of Cancellation.

The Court: Exhibit F is a Cancellation Notice prepared by Home.

Mr. Yale: It is so offered.

The Court: Exhibit F received in evidence.

Exhibit G is a Cancellation Notice prepared by Canadian.

Mr. Yale: So offered.

The Court: Exhibit G received in evidence.

Exhibit H is a letter from Franklin Insurance Service Corporation, dated May 10, 1956.

Mr. Yale: That is correct.

The Court: Exhibit H received in evidence.

Exhibit I is Escrow Instructions between Owens and Gilmore.

Mr. Yale: That is correct.

The Court: Exhibit I received in evidence.

Exhibit J is a letter from Yale, Wilson, Summers & Yale. [6]

Mr. Menzies: We object to that on the grounds that it is incompetent, irrelevant and immaterial, your Honor. It is merely a statement of counsel. It doesn't relate to the facts or prove or disprove any of the facts in issue.

The Court: Let's see it.

Mr. Yale: I might explain why we would like to have it, your Honor (handing document to the Court).

The Court: Everybody concedes that the letter was sent. There is no question about foundation.

Mr. Menzies: No, your Honor.

The Court: The letter was sent by plaintiffs' attorneys, and received by the defendants, I take it.

Mr. Davis: Yes, your Honor.

The Court: What does it add, Mr. Yale?

Mr. Yale: It adds this, we believe, your Honor. We feel that an issue is going to be involved, one remaining issue as a matter of law, whether interest should run on this judgment from the time that it became due, and we feel that if the Court has some problem fixing the date when interest should run from a refusal to honor the policies or to pay the loss that this may perhaps fix a date that the Court may select to have interest on the judgment.

The Court: For that limited purpose there would be no objection?

Mr. Davis: This may not be material to my side of [7] the case. But I, too, think that it is irrelevant and immaterial as showing notice having been given to all the insurance companies and claim being made, which would be one of the prerequisites.

Mr. Menzies: We object to it on the grounds that there is an unliquidated amount. Interest couldn't run for the reason that the amount stipulated in the Pretrial Order is less than the amount claimed.

The Court: I think maybe your point about interest on an unliquidated demand might be good.

Mr. Yale: I have cases and I am prepared to

argue that matter as to when I feel interest will be allowable.

The Court: I will overrule the objection and receive it in evidence.

Mark it, Mr. Clerk, as Exhibit J in evidence.

(The documents above described were marked and received in evidence respectively as Plaintiffs' Exhibits A to J, inclusive.)

Mr. Menzies: There is one thing that you neglected in your Pretrial Order to state clearly enough, and I understand that we are all agreed on this point, and that is that even to date the escrow between the parties has never been closed. Is that correct?

Mr. Davis: I know nothing about it.

Mr. Yale: It is my understanding that the escrow [8] has not been closed.

The Court: If either of you know, make the statement.

Mr. Yale: I know of my own personal knowledge.

The Court: It is stipulated, then, that the escrow has never been closed.

Mr. Yale: It has never been closed.

Mr. Menzies: Title hasn't passed; it still remains in escrow.

Mr. Davis: I don't know what materiality it has.

The Court: Whether material or not, it is stipulated, is that right?

Mr. Yale: So stipulated.

Mr. Menzies: So stipulated.

Mr. Davis: Yes.

Mr. Yale: I was going to offer some additional documents that have come to my attention. Counsel has indicated that they are immaterial. I would like to suggest this:

Would it be stipulated that at the time the Home and Canadian company policies were concelled that the Home and Canadian Companies knew of the particular loss?

Mr. Menzies: I assume that they did. They didn't receive any——

Mr. Yale: They didn't receive any formal notice, but—— [9]

Mr. Menzies: ——notice in accordance with the terms and conditions of the policy.

Mr. Yale: One additional stipulation that I would like to ask, Mr. Menzies, would be that the Home Insurance Company and the Canadian Fire Insurance Company were aware of the loss at the time that they cancelled the policies and made a pro rata refund of the premium. These documents reflect that, Mr. Menzies.

Mr. Menzies: I would assume that that is true.

The Court: Is it so agreed, then? So stipulated?

Mr. Menzies: So stipulated. But they didn't receive that notice from any of the named insureds in the policy.

The Court: Do you stipulate, too, Mr. Davis?

Mr. Davis: Yes, your Honor.

The Court: The stipulation is that the Canadian and the Home were aware of the fire loss at the

time when they cancelled their policies, but the stipulation does not mean that Mr. Menzies is conceding that any notices that might have been required under the policy were sent, advising of the loss.

Mr. Menzies: That is correct.

The Court: All right.

Mr. Yale: Your Honor please, I might just make casual comment as to what I believe the essence of the case is, [10] if the Court is so inclined.

The Court: All right, let's hear you now.

The case is concluded as to evidence, then. The Pretrial Stipulation will be considered as part of the record on the trial, the documentary evidence has been received, we have two other stipulations, here, and an amendment to the Fourth Defense of Mr. Davis, and the case is now ready for argument. Is that right?

Mr. Yale: That is right, your Honor.

Mr. Menzies: That is right.

Mr. Davis: That's right.

The Court: All right.

Plaintiffs' Argument

Mr. Yale: I would like to call the Court's attention to the fact that the defendant Tri-State concedes that its policy was in full force and effect as to these plaintiffs at the time of the loss involved —that is so conceded in the Amended Pretrial Stipulation, and the defendant Tri-State has never paid or deposited any of its loss payable under those policies, and the issue seems to be the ques-

tion: Are these other two companies responsible, under their policies, to contribute to the payment of the loss? And in essence, there is no defense by Tri-State as to the claim of these plaintiffs as [11] mortgagees.

The Court: You are, in substance, saying to Mr. Davis and Mr. Menzies, "You two fight it out." You would step aside and let them fight.

Mr. Yale: In essence, I feel that that is the case, your Honor.

The Court: I think it is, except that you have no showing in the record that no money has ever been paid. But I take it that that can be stipulated to also. No one of the insurance companies has ever paid your clients a dime; is that right?

Mr. Yale: That is correct, your Honor.

Mr. Davis: Yes. However——

The Court: Is it so stipulated?

Mr. Davis: We did tender to Mr. Yale our proportion.

I am not in doubt that there has been an offer to tender. Is that not correct?

The Court: That would bear only on the question of interest, wouldn't it?

Mr. Davis: Yes, your Honor.

The Court: You couldn't wipe out your obligation by a tender.

Mr. Davis: No.

The Court: Is it stipulated that no one of the three insurance companies involved has ever paid a dime to the plaintiffs or either of them? [12]

Mr. Yale: That is correct.

The Court: Is that correct, Mr. Menzies?

Mr. Menzies: That is correct; Canadian Home have not.

The Court: Has Tri-State?

Mr. Davis: Tri-State has not, as far as I know.

The Court: I suggest that you sit down, Mr. Yale.

Mr. Yale: I am finished, your Honor. I think the matter rests in their hands.

I might say that it is primarily a dispute between the insurance companies. I have prepared a brief on the issues of law that I would like to submit rather than take the Court's time to review that orally at this time.

The Court: All right.

Mr. Yale: Thank you.

Defendant Tri-State's Argument

Mr. Davis: I don't agree with Mr. Yale that the primary dispute is between the insurance companies, because as between the plaintiffs and my clients (and I assume the same to be true as to Mr. Menzies' clients) we have admitted—it was at one time thought that Mr. Morris had acquiesced in the cancellation, but the evidence was not as strong as I thought it was, and we stipulated and admit that as far as the mortgagees only were concerned our policy was in effect at the time of the loss. It was not, we maintain, in effect as to the named assured. But since he was not made a party here and did not come in, that is immaterial any-

way. We are dealing only with the plaintiffs' rights.

Under the standard mortgage clause which is attached to all these policies, the mortgagee's rights and interests are unaffected by the rights and interests of the named assured or owner. I say in most instances. I don't want to go quite that far. But in this case it is unaffected.

I have not elaborated in my memorandum filed in October upon plaintiffs' rights or the establishment of their contract, because I thought Mr. Yale's brief was pretty good itself and contained many and ample authority.

The Court: Just a minute. See if I am right about this. You concede that Tri-State is liable, but it is your contention that there should be some apportionment of the loss between Tri-State and Canadian Home.

Mr. Davis: I concede that the Tri-State policy was in effect up to $7,000.00 at the date of the fire as regards these two plaintiffs, yes, your Honor.

The cases hold without dispute that it is not a question of apportionment between insurance companies at all. It is a question of applying the liability of the insurance company to the assured or to the mortgagee, as the case may be, in accordance with the terms of the policy—in other words, [14] that we have to be liable beyond that proportion. Whether the other insurance is valid or not, or whether they collect it from the other makes no difference. But they cannot collect from us more than the amount that our policy bears to all other

insurance, whether valid or not or whether collected or not. That is the sole point.

Therefore, since Mr. Yale has undertaken to establish, and I think that he has amply established, that Home and Canadian policies were in full force and effect at the time of the loss, there is not much for me to say, other than to read the apportionment clause and give you one or two cases.

The Court: Was the apportionment clause in Tri-State's policy in similar language to the apportionment clause in Canadian's and in Home's policies?

Mr. Davis: I noticed the number, and they are. They are not statutory standard forms, but they are standard forms promulgated by the Rating Bureau. So they are all the same forms.

I don't think that, at this time at least, I ought to argue against Mr. Menzies' position, because he has not argued it yet.

But I say that Mr. Yale's position and his stipulation, the documentary evidence, the authorities that he has cited, with a great deal more energy than I have put in [15] because he has a very good group of authorities, all show that these two policies were in effect.

The Court: It is your contention, then, that the Home and Canadian policies should be taken into account valid or not.

Mr. Davis: Oh, yes.

The Court: Because there was what you speak of as what—existing insurance?

Mr. Davis: Yes.

The Court: What about the fact that this escrow had never closed and that Gilmore had never got title to this property and had no insurable interest? How can you say that it was a valid policy if there was no insurable interest?

Mr. Davis: But she has an insurable interest; no question about that.

The Court: What interest?

Mr. Davis: The interest is that she is a vendee in possession under contract. There can be many insurable interests, and perhaps at this time there were two insurable interests. But as to the insurable interest of Owens, who sold, and Gilmores, who bought, there is no question about that rule of law. I think Counsel cited some authorities—I didn't, because Counsel was alleging and proving that he had three policies of insurance.

But that is the rule of law, without question, that [16] a vendee under a contract in possession has an insurable interest. In fact, some states have held that he has the only insurable interest, even though he has not secured the legal title. But if the equitable and beneficial title are his, he has it all.

But in this state the courts have said several times—I couldn't put my finger on it, but I think I gave Mr. Yale some of those cases, and I think you have them here—there is no question about the mortgagees having an insurable interest. That if, under the terms of the contract, the contract is void as to the owner or the named assured, nevertheless it shall be valid in favor of the mortgagees because the mortgagees are a special class, a favored

class, because of the nature of their interest, and the insurance company may be subrogated to their rights, etc. But that is the rule, anyway. The mortgagees have an insurable interest.

The vendor has an insurable interest because he retains the legal title for the payment of his balance.

And the vendee has an insurable interest because he has paid a valuable consideration and is in possession.

The Court: Suppose that an insurance company sent a policy during escrow and said, "We enclose a policy of fire insurance which you are authorized to use and deliver, etc., as and when the escrow closes." Then what? The policy has been executed beforehand. [17]

Mr. Davis. The policy has been executed and delivered.

I would say that the policy as to the mortgagee, who did not procure the policy but for whose benefit it was procured, would be insured, even though it was left conditionally.

That is not the case here. There is no stipulation of that kind at all here.

The Court: The policy here was actually delivered to Gilmore, the buyer.

Mr. Davis: The policy here was actually delivered to Gilmore, and the certificates were eventually delivered to the plaintiffs here.

Am I right?

Mr. Yale: No. I obtained them.

Mr. Davis: Well, you obtained them. At least, the premium was paid and the policies were con-

tinued in effect. You will have to throw out the mortgagees' end of the policies or say that somebody obtained money under false pretenses, which is not the fact, as evidenced by the stipulation of facts here and the documentary evidence.

As I say, I think this is actually a problem of the plaintiffs.

I don't know what Mr. Menzies has to say about this.

The Court: Mr. Menzies. [18]

Defendant Canadian Home's Argument

Mr. Menzies: If the Court please, I believe that Vierneisel vs. Rhode Island Insurance Company, cited in the pretrial memorandum, answers Mr. Davis' argument. As I recall that case, the mortgagee, to wit : the plantiff was trustee to the extent of the policy, so far as Rose Gilmore is concerned.

But we are not concerned with that problem. We are concerned, as the Court pointed out, with an insurable interest in this respect; that the policy does not insure the individual, but it insures the property. Before the individual can collect under the policy, he must own that property or have such insurable interest, an interest that is tantamount to an ownership. In this instance, the escrow is still open.

The Court: The interests of the trust deed holders would be recognized both before the escrow closed and afterward—they had an interest in the property, and I take it from the escrow instructions that the owner was conveying his equity. The new

owner, Gilmore, would be taking subject to these trust deeds. So the holders of the trust deed have an interest in the property all the way along.

Mr. Menzies: But not under these particular policies, until title passed.

The Court: I understand that you collected a [19] premium and then rebated part of it.

Mr. Menzies: We collected a premium, and for the time that the policies were in force and effect.

The Court: That was from a time prior to the fire?

Mr. Menzies: That was prior to the fire.

The Court: And then part of that time was before the escrow closed.

Mr. Menzies: The escrow never closed.

The Court: Well, then, how can you collect a premium from these people on the theory that some insurance was in effect and the next minute say that there is no insurance in effect?

Mr. Menzies: For this reason, that the events that occurred were not brought to the company's attention until after the fire, and as soon as they were brought to the attention of the company they cancelled. Now they have a right to their unearned premium for the time that the policy was out. They have no way of knowing what the hazard is until it is brought to their attention. If you buy a policy, and then you change your mind and you want another policy and you cancel it, surely the company is entitled to a premium for that contingent exposure.

The Court: I agree, if there was an exposure.

But you contend that there was no exposure until after this escrow closes. [20]

Mr. Menzies: That is right, because Mrs. Gilmore had no title to that property. It was a pure contingency. It was contingent upon her meeting the requirements of the escrow and completing them, and to this day it has not been completed.

You may be named in a policy, but until there is some consideration passing—and none has passed so far as the record in this case is concerned, between the mortgagee and Mrs. Gilmore—there could not possibly be a contract.

The Court: I don't follow you on that. Gilmore has paid you a premium for a certain period of time. You never would have got a premium from the holders of the first deed of trust. They didn't owe you any money.

Mr. Menzies: No.

The Court: Gilmore was contracting for their benefit.

Nor would Gilmore have ever collected from the holders of the first deed of trust any part of her insurance premium. She couldn't go to them. There would be no consideration that passed between the first and second trust deed holders and the owner. She couldn't go around and say, "I have taken out some insurance. It is going to protect you. I want you to pay a part of the premium." They never pay any part of it. The only person who ever pays it is the record owner. Gilmore never became the record owner, but you took money from her; and

you say that you are entitled to take the [21] money because you had the risk. What was the risk?

Mr. Menzies: We had no way of knowing until after the fire occurred. We assumed, of course, that the escrow would go through, and if that were true then the Tri-State would be off the loss and the Canadian and Home were on it. It was a contingency there. Until that happens, Gilmore had merely a contingency or a contingent interest subject to the closing of escrow and the meeting of the requirements of that contract.

The Court: Wouldn't it have been the customary thing to do to have the insurance companies send their policies in, to be effective and to be delivered only upon close of escrow?

Mr. Menzies: No.

The Court: It would not.

Mr. Menzies: The only one that would be handled that way, your Honor, would be the one which the mortgagees held and which the seller held. That would be deposited to be prorated as of the close of escrow. And if you notice, in those escrow instructions, as I recall them, there is not any provision for that, and the escrow did not close. And under the Vierneisel case these plaintiffs held the proceeds of the Tri-State policy as trustee for Mrs. Gilmore in the event that title passes. Or they could have assigned it to her, under that case, or the proceeds of it, and she could have proceeded.

I think we have covered that situation in the [22] Holman case, which is cited in our briefs.

In California delivery of an instrument in es-

crow conveys no title land. Occupancy of the land while awaiting delivery of instruments in escrow does not give rise to any interest independent of the conditions of the escrow or contrary to it. The purchaser has no duties or liabilities growing out of an ownership interest in the land. All such liabilities remain in the vendor holding the title in ownership with its accompanying liabilities and burdens. That is the Chrisman case, at 35 Fed. Sup.

It is also required that this insurable interest exist when the insurance takes effect and when the loss occurs. That is the California Insurance Code, Section 286.

The Court: There is no question about that. But Gilmore is not suing here. The only question on that point of law is whether the trust deed holders had an insurable interest.

Mr. Menzies: They have none in that policy. It is contingent on passage of title. They obtain no better interest——

The Court: By the language of the policy?

Mr. Menzies: The policy names them as a mortgagee. But before they can get as a mortgagee of Rose Gilmore, there must be a mortgage in their favor.

The Court: Now wait. The policy, you say, names [23] them as mortgagees, which would be broad enough to cover the holders of trust deeds. They are mortgagees, regardless of whatever happens to Gilmore. I haven't seen those escrow instructions here, but there was no provision in the escrow that these obligations were to be refinanced,

was there? The Owenses were merely selling their equity to Rose Gilmore. The trust deed holders stayed right in place.

Mr. Menzies: That is right, sir.

The Court: Then where is there any contingency? They are mortgagees or trust deed holders at all times—before the escrow closes, after the escrow closes.

Mr. Menzies: That is true. But they still don't come within the provisions of the contingency to these policies according to the escrow, as I remember it.

The Court: What is the particular language upon which you rely? Let me see it.

Mr. Menzies: I think it is down at the bottom of that page.

The Court: I thought this was going to be a simple little matter, because this escrow never closed. But maybe not.

Mr. Davis: A conditional sales contract may run for years and years and never close so that the legal title is handed over to the purchaser. I don't know that it makes any difference. [24]

Mr. Menzies: They are to obtain a policy (indicating to the Court).

The Court: I am talking about the terms of your policy. You are relying upon some term of your policy?

Mr. Menzies: Our policy is the standard policy, but it is contingent upon the assured obtaining title to the property.

The Court: Where does it say that in your policy?

Mr. Menzies: It doesn't say that, your Honor. But that is what the Insurance Code says.

The Court: I don't think it says what you say it says. I don't see what you are talking about in here. Where does it say anything about——

Mr. Menzies: Secure policies, there at the bottom.

The Court: This part is signed by Owens, the seller. It says, "You will (talking to the Escrow), as my agent, assign any fire insurance and other insurance of mine handed you or that Beneficiaries inform you they hold. I agree to pay for policy of title insurance, assignments on fire insurance policies, obtaining Offset Statements, * * *" That is all it says.

Mr. Menzies: Let's see if that is the same as my copy here.

"Premium on fire and other insurance handed you or that Beneficiaries inform you they hold None * * *" [25]

I think that is signed by Mrs. Gilmore.

The Court: "Premium on fire and other insurance handed you or that Beneficiaries inform you they hold to none * * *" I read that as part of the beginning of that paragraph. It starts up there, "The following prorates and adjustments are to be made in this escrow: * * *" These are typical things that are prorated in escrow. First, they talk about interest, then they talk about taxes, then they talk about rents, and under rents they say "none."

When they talk about premiums on fire insurance they say "none." That is all I get out of that. There is to be no prorate of fire insurance.

Mr. Menzies: That, of course, means this, as I view it: that Mrs. Gilmore was not to prorate the existing Tri-State and that her policy would not take effect until the close of escrow.

The Court: Well, that is what you would ordinarily think an insurance company would do. But let me give you just a practical illustration of how this thing works.

I bought a house down here and I bought a 4-flat, and one was to close about December 26 last year and the other was to close about January 3. I couldn't be sure when they would close. My son-in-law sells insurance. So I said, "Cancel out your insurance. I'll buy some new insurance." I told the Escrow there would be no prorate of the insurance; I would buy some new insurance. How could I tell when the [26] escrow was going to close? And so without thinking about this—no harm occurred, but I can see that there might be serious problems—I told them to write one policy effective about December 23 or 24, and to write the other policy effective January 1, 1958, and send them down to the escrow. He sent them down. And the owners, who sold, will get a rebate on the insurance that they had.

These policies weren't delivered to be effective upon close of escrow. And I remember thinking about it now. The thought went through my head, how can I tell them exactly when the escrow will

close? They can't write a policy without a beginning date on it. It has to have a beginning date. Therefore, I just assumed that I would have to guess as close as I could and have them send the policies in.

Mr. Menzies: I have a similar situation now where a house under construction is being purchased and insurance has been ordered by the purchaser because of this case, and it takes care of that purchaser's interest in the property. There is no mortgage involved in this transaction, but I felt that that was the safer way of doing it. The premium on the policy for the few days in escrow is not very material, in the event you have a loss.

I assume that this contract in this case is enforcible for specific performance. Under the Viemeisel case, the plaintiffs here hold that money in trust for the purchaser, [27] and if the purchaser does not feel that they are protected they may take whatever policy they see fit. In this instance Mrs. Gilmore has the interest that Mr. Davis has pointed out. But the mortgagees don't have an interest in her policy because it is merely a contingency of title passing before her rights vest.

The Court: That is true; Gilmore's title is contingent. But there is nothing contingent about these trust deed holders. They have part of the title right now, and have had it all along, before the fire and after the fire. That is where I don't get your point. Unless your contention is that Gilmore had to have an insurable interest before the trust deed holders had an insurable interest, and since she never got

title then the policy was never effective as to the trust deed holders. Is that your point?

Mr. Menzies: Yes. Furthermore, that there was no consideration as between the mortgagees here and Gilmore or the companies. The plaintiffs here were mortagagees to the purchaser.

The Court: Where would there ever be any consideration? The mortgagees never pay any part of this premium. They never pay the owner any part of it. It is really a contract for the benefit of a third party, as far as they are concerned. They sit back. It is true that they may have an agreement in their trust deed that the owner will keep the property [28] insured. But they don't pay any money. No money consideration passes.

Mr. Menzies: Well, yes, there may not be a money consideration, if you put it that way. But they do have an interest in the property to the extent of the mortgage. But before they may take the benefit, as I read the Insurance Code, there has got to be some assumption of that mortgage by the named assured. They are merely contingent beneficiaries in this policy. They don't have a vested right there. There is no greater right than that of the named assured. I think that is where the situation arises. It is only in the event that the named assured takes title.

The Court: In going over this stipulation, my visceral reaction was that there couldn't be any liability on Home and Canadian. But you are not giving me a lot of help on it. It seemed to me that where people put policies into an escrow and the

escrow didn't close, the outfit that had the insurance beforehand ought to bear the loss. But Mr. Davis now represents that there is authority that if the policies were actually executed, whether valid or not they must be taken into account. And you haven't given me much to hang my hat on here.

Mr. Menzies: I can understand that. Maybe I can clear that up, your Honor. Every policy has that "valid and collectible or not" coverage. That means only this: Whether [29] valid or not, Tri-State is entitled to an apportionment of the insurance as the total amount of insurance bears to their proportion of the coverage.

But that would not apply here, because title did not pass to this property. These mortgagees did not order the policy. Tri-State was getting off the risk upon the closing of escrow and Canadian and Home were going on. That was a contingency. That was the understanding of the parties.

The Court: If the facts had shown that the policies went into the escrow but were to become effective as of the close of escrow, I could follow that. But apparently you collected premium on this policy from the time it was issued.

Mr. Menzies: That is true. But we are entitled to do that. If we don't do that, we have to account to the Insurance Commissioner for it. The minute that that policy goes into the hands of an assured or an escrow, the premium starts running from the date of the policy, and it continues for the term of the policy unless cancelled (1) by the company or (2) by the named assured.

Now these policies only make the plaintiffs here contingent beneficiaries. The named assured in this policy is Gilmore, and until Gilmore gets title to that property the policy would not be valid. That is why they cancelled off the minute that the situation was called to their attention, that [30] here is a matter in escrow—no title has passed.

The Court: As I say, my offhand reaction is that you are right. But you haven't given me much help to answer the arguments of Mr. Yale and Mr. Davis.

Mr. Menzies: I think I have answered them here, as far as I am able to do so, in the Holman case and in the Vierneisel case.

Further, of course, there are the additional points of the statute of limitations that would apply. We raise them in our Answer, and I don't believe that Tri-State did. And then there would have to be delivery to the morgagees, plaintiffs herein, before the policy was good.

The Court: There would never be any delivery to the mortgagees in the ordinary case, would there?

Mr. Menzies: Yes, in every instance the original policy, or a copy thereof, is sent to the mortgagee.

The Court: The first lienholder would probably get the original, and the owner would get merely a copy or a notice of insurance. What would the second lienholder get? He wouldn't get the original.

Mr. Menzies: If it covered his interest, he would get a copy—if that was shown on the policy, and upon passage of title he would get out of his escrow.

The Court: If these people are the equivalent of

third party beneficiaries under a contract, there doesn't have [31] to be any delivery of the contract to them.

I could contract with you to do something for Mr. Yale. It is a valid contract that Mr. Yale might enforce even though he didn't get delivery of it. Third party beneficiary contracts don't have to be delivered.

Mr. Menzies: That is true, I think, in every instance but in an instance like this, for this reason: that before a policy may be issued to the purchaser and have effect, the purchaser must have title to that property. Here you had a contingency. As an exception, of course, you do have certain situations, as where a tenant may insure his interest in the property. But here you don't have that situation. You have a contingency of title passing to the named assured.

The Court: Well, I am going to read over your briefs and if I want some more help I am going to ask you to write another brief.

I want to hear from Mr. Davis on this matter of the statute of limitations, set forth in the Answers of Canadian and Home.

Mr. Davis: Again, your Honor please, I think that is Mr. Yale's job, because as I have shown in my brief we are not concerned with defenses. If there is other insurance, then we apportion. Now the fact that he has presented the defense of the statute of limitations, or defenses of other sorts—he might present even a defense of arson, as far as [32]

that goes—as long as the policies were not void ab initio, then they apportion.

However, I will answer. Mr. Yale has the authority.

You cite an Oklahoma authority. I gave you one.

The Court: You are going to rely on the authorities of Mr. Yale on this matter of the statute of limitations?

Mr. Davis: I have given him some authorities.

These policies are statutory policies, as provided by the Insurance Code.

We don't have a case precisely in point in California on the question which Mr. Menzies has raised.

The fire was on September 27, and the suit was filed on September 27. This Oklahoma case, which I think Mr. Yale has in his brief——

Mr. Yale: New York case.

Mr. Davis: There is an Oklahoma case that said that the policy is a statutory policy, the limitation is a statutory limitation, and the statutory methods of determining that limitation must be used and applied. We have our rule excluding the first and including the last. Mr. Yale has brought his action within time.

As I say, that is not my part of the case at all, because if he had a policy at all it wouldn't make any difference to this so-called apportionment whether he didn't prosecute his action where he didn't have a defense. [33]

If your Honor wants me to answer Mr. Menzies, Mr. Menzies keeps saying that they must have the

title. That is not the law, and it would be a monstrous situation if it were the law. That anybody who buys a piece of property on conditional sale and doesn't get the deed, doesn't have title and couldn't get insurance.

I think there has been no insurance case that has interpreted this—in fact, I don't think there is any interpretation at all. Section 1662 of the Civil Code, which is the Uniform Vendor and Purchaser Risk Act, provides—the apportionment is applicable here:

"Any contract * * * for the purchase and sale of real property shall be interpreted as including an agreement that the parties shall have the following rights * * * unless the contract expressly provides otherwise:

* * *

"(b) If, when either the legal title or the possession of the subject matter of the contract has been transferred, all or any part thereof is destroyed without fault of the vendor or is taken by eminent domain, the purchaser is not thereby relieved from a duty to pay the price, nor is he entitled to recover any portion thereof that he has paid." [34]

Section 1742 of the Civil Code, in effect, has that same provision with reference to personal property.

Now for many years we had in California a rule that the vendor having entered into a contract and put the vendee in possession was not the sole and unconditional owner, and that is what Mr. Menzies is confusing here. He doesn't read his cases.

In our former California standard policy, we also

had a provision that this entire policy shall be void if the insured is not the sole and unconditional owner of the property. That provision was taken out when the new standard policy was adopted about ten years ago.

Under the Vierneisel case the defense was sought to be made that it was not the sole and unconditional owner.

But we are no longer concerned, under our standard policy, with the sole and unconditional ownership. Our policies now insure to the extent of the insured's interest. It may be little or it may be less. He may be the vendee in possession, he may be a vendor out of possession, he may be a mortgagee or a mortgagor. But the policy insures John Smith to the extent of his interest. Your mortgage clause goes still further. That provides that the rights of the mortgagee shall not be affected by any act or neglect of the assured.

To simplify it again. Here is Rose Gilmore, a [35] purchaser under contract in possession, as is shown by the escrow agreement and by the very stipulation on which we are arguing this case. Rose Gilmore procured, for her own benefit and for the benefit of these two mortgagees, two policies of insurance. She pays the full premium, a valuable consideration, and the company accepts it, and the contract has no ambiguity in it. These two policies are on. If they are on, then the question of the proportionate liability is simply a mathematical matter.

Mr. Menzies speaks of having to have the title. But the Code doesn't. The Code states:

"Every interest in property, or any relation thereto, or liability in respect thereof, of such a nature that a contemplated peril might directly damnify the insured, is an insurable interest."

So Rose Gilmore had an insurable interest.

The Court: She is not even a party.

Mr. Davis: No, it is not for us to weigh the extent of her interest. We know what the mortgagees stipulated. They had the full insurable interest.

The Court: I am going to mark the matter submitted, and if I am not satisfied with your briefs I am going to ask you to write some new ones.

Mr. Davis: I will confess that I didn't write much [36] of a brief. I made just the one point.

The Court: I have a note here that you are relying on Mr. Yale's brief, which you compliment highly.

Mr. Davis: I suggested some cases to him and let him do the work. I have gone through this many times, and I get rather excited when I hear somebody make statements of law such as have been made here today.

The Court: Mr. Yale.

Mr. Yale: If the Court please, I have not covered the matter whether we would be entitled to interest on the judgment. Would the Court prefer that that be submitted in the form of a letter, with authorities?

The Court: Don't make it a letter. Submit me a memorandum on interest.

Mr. Yale: I have just one authority.

The Court: If it is just one authority, I'll write it down.

Mr. Yale: Chase vs. National Indemnity Company, 129 Cal. Ap. (2nd) 853.

The Court: In point?

Mr. Yale: In point.

That case interprets Section 3287 of the Civil Code.

Subhead (21) in that case, incidentally, is the important point.

The Court: Submitted.

[Endorsed]: Filed October 9, 1958. [37]

[Title of District Court and Cause.]

CERTIFICATE BY CLERK

I, John A. Childress, Clerk of the above-entitled Court, hereby certify that the items listed below constitute the transcript of record on appeal to the United States Court of Appeals for the Ninth Circuit, in the above-entitled matter:

A. The foregoing pages numbered 1 to 79, inclusive, containing the original:

Petition for Removal from State Court, etc., containing copy of Complaint, Summons, etc.

Answer of Defendant, The Canadian Fire Ins. Co.

Answer of Defendant, Tri-State Mutual Grain Dealers Fire Ins. Co.

Amendment to Answer of Defendant, Tri-State Grain Dealers Fire Ins. Co.

Answer of Defendant, The Home Insurance Co.

Amended Pretrial Stipulation.

Memorandum of Court.

Findings of Fact, Conclusions of Law and Judgment.

Minute Order, 7/28/58.

Notice of Appeal (Tri-State Mutual Grain Dealers Fire Ins. Co.).

Bond on Appeal (copy), Tri-State Mutual Grain Dealers Fire Ins. Co.

Designation of Record on Appeal (Tri-State).

Statement of Appellant's Points on Appeal.

Cross-Appeal by C. R. Morris & Constance B. Honaker.

Bond on Appeal (copy) , C. R. Morris, et al.

Designation of Record on Appeal (Cross-Appellants).

Statement of Cross-Appellants' Points on Appeal.

B. Plaintiff's Exhibits A to J, inclusive.

C. One volume of Reporter's Official Transcript of Proceedings had on: February 3, 1958.

I further certify that my fee for preparing the foregoing record, amounting to $1.60, has been paid by appellant.

Dated: October 17, 1958.

JOHN A. CHILDRESS,
Clerk.

[Seal] By /s/ WM. A. WHITE,
Deputy Clerk.

[Endorsed]: No. 16226. United States Court of Appeals for the Ninth Circuit. Tri-State Mutual Grain Dealers Fire Insurance Company, Appellant, vs. C. R. Morris, Constance B. Honaker, The Home Insurance Company and The Canadian Fire Insurance Company, Appellees. C. R. Morris and Constance B. Honaker, Appellants, vs. The Home Insurance Company and The Canadian Fire Insurance Company, Appellees. Transcript of Record. Appeals From the United States District Court for the Southern District of California, Southern Division.

Filed: October 18, 1958.

Docketed: October 22, 1958.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.